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RAILROADS

RATES—SERVICE—MANAGEMENT

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RAILROADS

Rates—Service—Management

BY

HOMER BEWS VANDERBLUE, PH.D., 1888 -
PROFESSOR OF BUSINESS ECONOMICS, HARVARD UNIVERSITY;
SOMETIME PROFESSOR OF TRANSPORTATION,
NORTHWESTERN UNIVERSITY

AND

KENNETH FARWELL BURGESS, LL.B.
MEMBER OF THE CHICAGO BAR; GENERAL ATTORNEY, CHICAGO,
BURLINGTON & QUINCY RAILROAD COMPANY

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To

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AND

I. F. V.

PREFACE

Railroad regulation in the United States is accomplished by an elaborate system of governmental machinery. This book is designed to give information concerning that system useful both to students and to men of affairs—to those of the general public who desire to know the present methods of regulation, to students approaching an intensive study of railroad practice, and to railroad officers whose duties have been restricted to limited fields. It is neither a law book nor a mere text on economics, but is rather a volume presenting thoughtful observations resulting from joint experience in teaching the subject matter in a university school of commerce and in active practice before courts and commissions.

The immediate occasion for this presentation is the enactment of the Transportation Act, 1920, and interpretations which are being placed upon it by courts and commissions in its practical application. This Act contains radical changes in regulatory methods. The original Act to Regulate Commerce was enacted in 1887. There have been three comprehensive amending acts: the Hepburn Act in 1906, the Mann-Elkins Act in 1910, and the Transportation Act in 1920. During the war period the Federal government operated the railroads pursuant to the Federal Control Act of March 21, 1918. To terminate Federal control and to remedy weaknesses disclosed in the prior laws, the Transportation Act, 1920, was enacted and approved February 28, 1920. It changed the title of the "Act to Regulate Commerce" to the "Interstate Commerce Act" and by amendments enlarged and supplemented the power of the Federal regulatory agency, the Interstate Commerce Commission. "The act made a new departure," declared the Supreme Court, in upholding certain of its provisions. The prior acts were directed primarily to the regulation of rates; the new act greatly extended incidental powers of regulation of service and management which

had been granted to the Commission by the amendments of 1906.

It is of the present law and present system of regulation that this book treats. The general scope of the various amendatory acts is indicated by the outline reproduced in the appendix, p. 437. Important statements of fact and principle are authenticated by references to cases to enable readers who so desire to go to the sources. These citations are supplemented by an appended list of cases and by references to outstanding contributions to the literature of the subject. These references have been chosen with the needs of teachers in mind. We have sought to furnish a guide to historical discussions and to notable court or commission opinions illustrating the principles stated in the text.

For incisive criticism covering matters, both of substance and of form, we desire to acknowledge our debt to Messrs. D. H. Bremerman, Leslie Craven, George H. Burgess, George A. Hoffelder, W. E. Lagerquist, H. W. Johnson, and Walter McFarland. Dr. Julius H. Parmelee and Mr. Richard H. Johnston of the Bureau of Railway Economics have generously responded to requests for information, and Messrs. Frank J. Vanderblue and Charles L. Carroll have aided with data on rates and rate adjustments. To Dr. Arthur H. Cole we are indebted for reading the proofs.

KENNETH F. BURGESS
HOMER B. VANDERBLUE.

January, 1923.

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PART I

THE SCOPE AND MACHINERY OF REGULATION

RAILROADS

RATES—SERVICE—MANAGEMENT

CHAPTER I

THE SUBJECT MATTER OF REGULATION

RATES—SERVICE—MANAGEMENT

§ 1. Public demand for railroad regulation upon a comprehensive scale in the United States followed close upon the panic of 1873. The immediate occasion for that crash had been the failure of the Jay Cooke banking house, which, almost unsupported, had financed the construction of the Northern Pacific to the Missouri River crossing at Bismarck, North Dakota, but could carry the burden no longer. July 1, of 1875, found 11,125 miles of line in the hands of receivers; the overbuilding of railroads was an underlying cause of the crisis.[1] Other causes lay still deeper: the maladjustment of world affairs occasioned by war on two continents.

In 1860 but one considerable line of railroad existed west of the Mississippi, the Hannibal & St. Joseph, less than 200 miles long. By 1873 there had been built, in the tier of states between the Missouri River and the Mississippi River, over 9,000 miles of

[1] H. H. Swain, *Economic Aspects of Railroad Receiverships*, p. 70. On January 1, 1872, only 6 roads, with 1.56 per cent of the total mileage of the country (941 miles) were in the hands of receivers. The peak was reached January 1, 1877, when 85 companies operating 13,972 miles, 18.19 per cent of the total, were in the receivers' hands. By July 1, 1883, only 20 companies, operating 2,100 miles, 1.83 per cent of the total, were in the receivers' hands.

railroad, and, in Kansas and Nebraska, 3,000 miles more. Kansas City, Omaha, Minneapolis and St. Paul were railroad centers. Wisconsin contained some 2,100 miles and Illinois nearly 7,000. These railroads, built into new country, were largely dependent upon the cereal crops, wheat and corn, and, to a lesser extent, upon live stock for their revenue producing traffic.

Grain prices had been high during the war and the period of feverish building; so high as to tempt settlers to go into debt to secure title to land in the rich new country.[1] Means of transportation were necessary to reach the market. In some instances, farms were mortgaged to assist in financing railroads, and the national government, succumbing to local pressure, and to the importuning of promoters, made generous grants of public land to attract private investment in railroads. Soon newly built railroads were offering settlers cheap lands, sold on installments, while newly organized communities were voting bond issues and gratuities to other lines. The result was that both railroads and settlers moved too far west to stand a period of dull business such as accompanies deflation. The New York price of wheat which, in April of 1867, had reached a record price $3.175 (paper currency) had fallen to $1.225 in April of 1870. The New York price of corn had dropped from $1.81 in January, 1865, to 54.75 cents in July, 1873.[2] This price decline

[1] "Not less immediately connected with this opening up and settlement of our agricultural West was still another phenomenon, of peculiar interest to the study of the ensuing period. The average price of grain had advanced with great rapidity during the Civil War. In 1867, the price of wheat, even on the Chicago market, reached the remarkable level of $2.85 per bushel; nor was this price greatly above the annual maximum of the period. In a large degree, this advance resulted from inflation of the American currency. But the upward movement was world-wide; in 1867 and 1868 the average price, even in England, was close to the equivalent of two dollars a bushel. That any such abnormal market could be maintained in the face of the new American supplies was at least improbable. The area of wheat, corn, oats, rye, and barley in the United States rose from 64,418,518 acres in 1867 to 86,287,648 in 1875, and to 100,283,160 in 1878. The yield of these five crops increased from 1,320,236,000 bushels in 1866 to 2,290,008,000 in 1878, the annual wheat crop more than doubling in magnitude. The increase in cereal production was twice as rapid as the country's increase in population; the United States became therefore the leading figure in the world's export markets; and this was certain to have important influence on prices." —Alexander Dana Noyes, *Forty Years of American Finance*, p. 3.

[2] G. F. Warren, *Prices of Farm Products in the United States*, U. S. Dept. of Agriculture, Bulletin No. 999, pp. 29-30. An elaborate study is that of Wesley C. Mitchell, *Gold, Prices and Wages under the Greenback Standard.*

was so drastic that the farmer, selling in highly competitive markets, netted little for his grain and live stock after meeting the charges for the essential transportation service. He soon held the railroad companies in a large measure responsible for his losses not because he was a poor loser but because, for farm products, transportation charges determined to a large extent whether goods once produced could be marketed. Freight charges were a tangible item deducted from the proceeds of sales. Under these circumstances it was not difficult to create popular excitement against freight charges alleged to be exorbitant. Fifty years later a slump in agricultural prices found ready explanation of the same character.[1]

§ 2. Throughout the Middle West, legislatures were elected which were pledged to enact legislation that would result in rate reductions. In the group of upper Mississippi Valley states, which were hardest hit by the depression,—Illinois, Iowa, Minnesota, Missouri and Wisconsin, together with Michigan—regulatory commissions were created, largely as a result of this popular protest by the farming classes. The beginnings are found even before the panic year.[2] The agitation echoed in Washington. President Grant, in his message of 1872, suggested a committee

[1] In 1921 a Joint Commission of Agricultural Inquiry was created to investigate and report to Congress on the following subjects:

1. The causes of the present condition of agriculture.
2. The cause of the difference between the prices of agricultural products paid to the producer and the ultimate cost to the consumer.
3. The comparative condition of industries other than agriculture.
4. The relation of prices of commodities other than agricultural products to such products.
5. The banking and financial resources and credits of the country, especially as affecting agricultural credits.
6. The marketing and transportation facilities of the country.

The commission made an extensive study of the following subjects and divided its report into four parts, considering in separate volumes:

1. The condition of agriculture and the factors which caused it.
2. The adequacy and effectiveness of the credit machinery and resources of the country.
3. Transportation.
4. Marketing and distribution.

Report of the Joint Commission of Agricultural Inquiry. House Report No. 408, 67th Cong., 1st Sess. The volume on transportation (686 pages) appeared in the middle of the summer, 1922. It is hereafter cited as *Report of Joint Commission of Agricultural Inquiry; Transportation.*

[2] S. J. Buck's *The Granger Movement* is a more recent treatment of the subject than Charles Francis Adams' *Railroads: their Origin and Problems,* or Arthur T. Hadley's *Railroad Transportation.*

or commission "to consider various enterprises for the more certain and cheaper transportation of the constantly increasing Western and Southern products to the Seaboard." Senator William Windom of Minnesota was made chairman of a Select Committee on Transportation Routes to the Seaboard. The report of that committee indicated "the imperative necessity for cheaper means of internal communication." But, while the committee was investigating the causes of the agricultural depression, in relation to transportation, the states were acting. There the local pressure could enforce the passage of legislation.

The commission system of regulation was not new in the United States. In 1855, New York had enacted a commission law, which, however, was destined to be short lived. The real beginning was made in Massachusetts in 1869. Under the leadership of Charles Francis Adams, Jr., the Massachusetts Commission did its work effectively, although it had no real power except the power to report. The Commission's work reflected a business man's appreciation of the underlying problems. Mr. Adams was a man of affairs as well as student, and by sheer force of leadership the Massachusetts Commission introduced improvements in accounting, secured the adoption of safety appliances, and trained railroad managers to understand that their long run interests and the interests of the community were identical.[1] The Massachusetts Commission had no authority to make orders;—it was an investigating body. In contrast, the Commissions set up in the middle western states were granted affirmative authority to regulate railroads. By 1878 sixteen states had created railroad commissions,[2] and, in that year, twelve of these states joined in a national convention of railroad commissioners, held at Columbus, Ohio, to discuss the common problems with which they were confronted. These state commissions, and the powers granted to them, represented real inno-

[1] Mr. Adams was President of the Union Pacific from 1884 to 1890. He contributed the railroad essays contained in *Chapters of Erie*, published with his brother, Henry Adams, in 1871; he wrote *Railroads: their Origin and Problems*, published in 1878; and *Railroad Accidents*, published in 1879. *Railroads: their Origin and Problems* discussed the work of the Massachusetts Commission.

[2] California, Connecticut, Illinois, Iowa, Maine, Massachusetts, Michigan, Minnesota, Missouri, New Hampshire, Ohio, Rhode Island, Vermont, South Carolina, Virginia, and Wisconsin. Cullom Committee Report of 1886, p. 65.

vations, a contribution by Americans to the science of government. The commissions were administrative bodies, unlike the British Railway and Canal Traffic Commission of 1873 which, to all intents and purposes, was a court.

§ 3. The results which the establishment of these state regulatory commissions sought to achieve are set forth in the First Annual Report (1878) of the Iowa Board of Railroad Commissioners:

> "The public desire and expectation was and is for a system that would be an effectual guard against unjust discriminations, that would furnish to all shippers and patrons alike, equal facilities and privileges, that would insure transportation of persons and freight on equal terms, that would grant to all such drawbacks, concessions and special rights as might be allowed to any where the conditions are the same, that would effectually guard against any inequalities of rates or privileges where the circumstances were similar, and that would secure the patrons of railroads against unreasonable charges for the transportation of freight, for handling and storing it, for the use of cars, or for any other privilege or service afforded by them in the transaction of their business as railroad corporations."

In five years the burden of complaint had largely shifted from a claim that rates were excessive to one alleging inequality of treatment. The reasons for this change in emphasis are several. There had, in the first place, been a reaction from the more radical Granger policies. When railroad bankruptcies followed the slump in agricultural prices, when construction was stopped, and even maintenance was deferred so that the railroad plant ran down physically, the same sort of logic which, blaming the railroad for all evils, had sought a panacea in legislation, soon blamed the legislation for the new evils. The Granger laws were repealed or were not enforced rigidly. Sometimes the carrier managers simply ignored them. In the second place, the prices of agricultural produce "came back," not to the former inflated paper money basis, but, in the general price readjustment, to a profitable level. The European harvests of 1879, much below the usual standard in quality and quantity, inaugurated a period of general European agricultural depression. The American farmer benefited as his English and continental competitors suffered. And, finally, railroad competition had done what the laws were passed to do—rates had been cut, especially

competitive rates. But where competition did not force the payment of rebates, or the cutting of rates, charges were frequently maintained on a high level. Because of practices, such as these, resulting from uncurbed competition, there grew up the feeling that the "paramount evil" of railroad practice was discrimination in rates, rather than an unreasonably high level of rates.

In 1886 a Senate committee, of which Senator Cullom was chairman, made its report, which was accompanied by a bill. After reviewing eighteen general causes of complaint against the railroads, the committee said:

> "It will be observed that the most important, and in fact nearly all, of the foregoing complaints are based upon the practice of discrimination in one form or another. This is the principal cause of complaint against the management and operation of the transportation system of the United States, and gives rise to the questions of greatest difficulty in the regulation of interstate commerce."[1]

In submitting the bill accompanying the report, the committee stated:

> "This measure is not offered as a panacea for all the evils growing out of the management of the transportation system of which the people have for years complained, and for which they are disposed to seek a legislative cure. Indeed, as we have already said, 'That a problem of such magnitude, importance and intricacy can be summarily solved by any master stroke of legislative wisdom is beyond the bounds of reasonable belief.' Neither is it simply a tentative measure intended to pave the way for additional legislation. . . . The provisions of the bill are based upon the theory that the paramount evil chargeable against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the measure is the prevention of these discriminations, both by declaring them unlawful and adding to the remedies now available for securing redress and enforcing punishment, and also by requiring the greatest practicable degree of publicity, as to the rates, financial operations, and methods of management of the carriers."[2]

This feeling was general when, in 1887, Congress set up a national commission by the Act to Regulate Commerce. The new law followed, in the main, the provisions of the various state

[1] Cullom Committee Report, p. 182.
[2] *Ibid.*, p. 215.

laws and the English Act of 1873. The primary purpose was to regulate rates: to prevent extortion, and to relieve against unjust discrimination by securing equality of charges as between travelers and shippers. To the cry against exorbitant freight rates sent up by the farming class had been joined bitter complaint by business men alleging abuses in the form of rebates to favored shippers and preferential rate adjustments to favored localities.

The original Interstate Commerce Act was, after all, merely a bare outline. It filled less than a dozen printed pages. Today a book of 200 pages is required to present the Act, expanded to 85 pages, and the text or related sections of other laws governing the regulation of railroads by the national government. The original Act did not contain even a restatement of the service obligation of the common law; not until 1906 was it made the clear duty of the carriers subject to the Act to furnish transportation upon reasonable request. Indeed, regulation of service was, in the beginning, practically confined to state action.

State authorities have successfully asserted the right to require railroad companies to operate in the interest of the safety and convenience of their customers: from the standpoint of the public interest, to establish new stations, to change the grade of their tracks to conform to that of streets crossing it, to build overhead and underground crossings, to use particular devices such as headlights and automatic bell ringers, to discontinue the use of stoves in heating passenger coaches, and to operate trains within specified time limits. The state railroad commissions have, in some states, been authorized to regulate the distribution of cars, and to require the construction of spur tracks for the receipt and delivery of freight. In their "full crew acts" many states have regulated the number of trainmen to be assigned to the operation of passenger and freight trains. Even municipalities have enforced the installation of safety gates, lights and signal devices at crossings, the maintenance of watchmen and flagmen, and operation within the municipal limits at a speed not to exceed specified limits of safety.

§ 4. While these powers were being asserted by state authorities, the scope of national regulatory legislation was also widened to comprehend service responsibilities, and, especially by the

Transportation Act of 1920, to invade the field of management. In 1906, transportation had been defined broadly to include "cars and other vehicles, and all instrumentalities and facilities of shipment or carriage . . . and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported." The Interstate Commerce Commission now has wide powers in respect to the distribution of cars, the priority of movement in time of emergency, the supply of cars, locomotives and trains, and the joint and common use of terminals. Thus the provisions of the amendments to the Act, or of new laws, whose enforcement has called for the attention of the Interstate Commerce Commission, have had to do with service and management, subjects which the original act treated superficially if at all, as well as with rate regulation.

In the interests of safety and humanity, the Federal government has also required headlights, automatic couplers, automatic train control devices and other safety appliances; it has limited the hours during which trainmen may be continuously employed; and it has insisted upon the unloading of live stock for feed, water and rest at specific intervals. Locomotive inspection is required; the transportation of explosives is hedged about with restrictions; reports of accidents must be made. In addition to these particular regulations of service the public has also quite generally asserted the right to require non-discriminatory service. If a railroad company offers a particular service to the public, the service must be performed without unjust preference or discrimination as between individuals. And now no new railroad (or extension of an existing line) can be constructed without authorization from the Interstate Commerce Commission. Congress has even undertaken to authorize the Commission to require the construction of additional lines of railroad, although the validity of this provision has not yet been sustained by the courts.

To draw the line between regulation of service and regulation of management is not easy. It is the function of railroad management to furnish service. And service regulation can be made effective only by pressure exerted upon railroad managers. A working distinction assigns the determination of policies to

the field of management. Service is concerned with details of operation. The Supreme Court of the United States once said:

> "It must be remembered that railroads are the private property of their owners, that while, from the public character of the work in which they are engaged the public has the power to prescribe rules for securing faithful and efficient service and equality between shippers and communities, yet, in no proper sense, is the public a general manager."[1]

The management of certain railroads was, however, the target for criticism by the Commission when it condemned the managers of the New York Central and Pennsylvania railroads for contracting for the repair of locomotives instead of doing the work in their own shops, in the days following the return of the railroads to their owners, March 1, 1920. The opinions published two years later, after a business depression had taken away the need for a quick repair of equipment, were not unanimous (the vote was six to five), one commissioner saying in his dissenting opinion:

> "Criticism of a transaction in a particular situation can do no good. It may do harm. . . . If, in the future, the officials again should be confronted with what seems to them an emergency situation, and they recall our criticism in the present case, they would do one of two things—either disregard our criticism and boldly go ahead and do what they thought they ought to do, as they should, or they would say: 'We did what we thought was best before and were reprimanded. Now we will play safe. . . . If we fail, only the public will suffer. The responsibility will be on the Interstate Commerce Commission, and our failure will never be known.' To encourage such an attitude and to so dissipate ambition and resolution, as it seems to me might be the effect of adopting the policy of our report, would be unwise . . . we should stimulate initiative, courage and prompt action and a willingness to take on and quickly solve big problems. If railway operating officials, responsible for furnishing transportation for the public needs, are to stop before acting and wonder whether we are going to criticise them or not, the result, as far as the country is concerned, will be far worse than the occasional losses which may occur through the courageous and prompt exercise of judgment."[2]

The service obligation has extended the scope of regulation in another direction. While it had been assumed that

[1] I. C. C. *v.* C. G. W. R. R. Co., 209 U. S. 108, 118.

[2] Construction and Repair of Railway Equipment: Penn. R. R. Co., 66 I. C. C. 694, 716.

the wages paid employees was a matter of negotiation and bargain between the management and the employees, threatened "traffic interruptions" following wage disputes resulted in a demand that, in this field also, the paramount interest of the public gave to it a right to control and regulate. The Adamson Law of 1916 was the first general attempt to carry this theory into execution, and the Supreme Court upheld the law as a valid exercise of power.[1] The public is entitled to continuity of service. In 1920 the Federal government created the Railroad Labor Board, to which was given certain jurisdiction in respect to disputes regarding the matter of wages and working conditions.

§ 5. But, if the public responsibility of management is to perform service, its private responsibility is to earn profits. Even this phase of management has been invaded by public regulation. This invasion has been effected through the extension of a doctrine developed in the regulation of rates: the doctrine that a railroad is entitled to earn a fair return upon the value of its property devoted to transportation. To make this doctrine a workable tool of regulation the Federal government, following individual states, notably Texas, Wisconsin, Michigan and Minnesota, in 1913 undertook the work of railroad valuation, a work uncompleted in 1922. In the Transportation Act, 1920, Congress also enacted a new section, designated as Section 15a of the Interstate Commerce Act, which will be considered later, in which it directed the Commission to prescribe rates which would, as nearly as possible, yield a fair rate of return upon the aggregate value of railroad property devoted to the public use in each of any rate districts into which the Commission might divide the country.

Thus, while the system of transportation in the United States has been created by private capital and the operation of the railroads is maintained through the medium of private corporations, it is apparent that the regulation of rates and charges, service and management, asserted by the legislative authority, both state and national, and sustained by the courts, has created a great body of rules and laws that affect every person who travels, or ships his goods from one point to another. The railroad manager has left to him, in respect to the fixation of rates only the initial

[1] Wilson *v.* New, 243 U. S. 332.

action, always subject to review upon complaint by anyone aggrieved. He is subject to service regulations; and, even in relations so important as those with labor, he cannot act without consideration of the government agency. Corporate transactions, such as the purchasing of supplies, the issue of securities, consolidation with and acquisition of other railroad properties, are also subject to Federal regulation in greater or less degree. No individual may be an officer or director of more than one interstate railroad unless authorized by the Commission.

§ 6. The encroachments of national authority upon the regulatory activities of the states have likewise been steady and certain. No other result has been possible. In the field of rate making it has been found impracticable to allocate expenses to purely state operation as distinguished from interstate operation. State lines do not conform to the boundaries of economic provinces, and the attempts of state authorities to foster local business interests at the expense of competitors in other states disclosed a class of discriminations which could be reached and cured only by the national power.[1] "Commerce is a unit, and does not regard state lines."[2] It was also necessary to make service conditions uniform, in the interest of equality of treatment and of economy in operation. The same men conduct both interstate and intrastate commerce; the same rails, the same cars, the same trains carry both. Where safety is a factor, conflicting regulations must be avoided. And, finally, a scheme for a comprehensive regulation of earnings has called for a consistent administration of uniform rules for accounting, valuation, consolidation and the issue of securities. More and more, Congress and the courts are treating railroads as a "national system of transportation" and state regulation is being confined to routine administration of details requiring a knowledge of purely local conditions.

[1] Houston E. & W. T. Ry. Co. *v.* U. S., 234 U. S. 342.
[2] R. R. Com. of Wis. *v.* C. B. & Q. R. R. Co., 257 U. S. 563.

CHAPTER II

THE AGENCIES OF REGULATION

§ 1. The intricacies of railroad operating problems forced the public, when resolved to regulate railroad rates, service and management, to undertake the task through the creation of small administrative bodies. These were variously known as railroad commissions, railroad and warehouse commissions, and, at a later day, as public service or public utility commissions. Some states called the bodies performing similar functions, boards. The national regulatory authority has always been called the Interstate Commerce Commission.

Regardless of possible weakness as to personnel, the theory of regulation by commission is sound. Successful regulation concerns itself with a multitude of details. Transportation conditions are subject to constant change. No series of legislative acts could be elastic enough to accomplish the desired results, even though the legislators at the time of the passage of the laws were fully advised as to the then existing conditions which made those laws necessary or desirable as regulatory measures. The conditions might so change within a few weeks or months as to make the regulations extremely burdensome instead of helpful to either the public or the carriers. To be successful, railroad management must be alert, like all other industrial management, to meet constantly changing circumstances with immediate action appropriate to the problems presented. An unyielding body of arbitrary rules of law, subject to repeal only through the slow process of routine legislation, could not possibly satisfy the requirements of either the public or the railroads. The

creation of a body free from the responsibility of meeting routine problems of operation, and concerned only with general principles of public policy, must be a distinct gain, if only permanence of tenure, continuity of policy, and freedom from political influence can be assured. When it is realized that the scheme of regulation by commissions is barely fifty years old, while the railroad business has yet to celebrate its centenary, the achievement of private management and public regulation appears the more marvelous.

In theory these commissions have been composed of trained experts—men "informed by experience," as the Supreme Court once described them. In practice, the state commissions in the past too frequently have been political appointees, or elected professional politicians, with little or no experience in connection with the operation or regulation of railroads. In past years when certain railroads mixed in state politics, they were not above securing the appointment or election of their friends to the bodies presumed to regulate their operations in the public interest. Not until the new generation of railroad managers took hold—and in some instances, too recently—have the railroads withdrawn from politics. On the other hand, state commissions have at times been elected on platforms calling for reductions in rates and fares. Manifestly, neither situation is desirable in the public interest. Carriers and shippers are mutually necessary to the business growth of the country, and neither group in the long run can profit by dealing unfairly with the other. Happily, appointments to the Interstate Commerce Commission have seldom been based upon personal or political grounds.[1] Nor have sectional interests governed.[2]

§ 2. At the time the Federal government created the Interstate Commerce Commission in 1887, twenty-five states had set

[1] A former Chairman of the Commission recently testified before the Senate Committee on Interstate and Foreign Commerce, expressing the opinion that in the event political considerations should be permitted to dictate the appointment of commissioners, much of the efficiency of the Commission, as well as public confidence in its work, would be seriously impaired. This is doubtless true.

[2] With the death of Commissioner Clements of Georgia in 1917, the cotton states lost their only representative. There are (Jan. 1, 1923) three commissioners from the Mountain-Pacific Coast states, two from Wisconsin, two from New Jersey, and one each from Kentucky, Indiana, New York, and Massachusetts.

up commissions to regulate railroads within the limits of their state authority. Today there are state railroad commissions in all states except three. State regulation, like regulation by the Federal government, concerns itself with rates, service and management. State commissions exercise initial jurisdiction over the local operation of railroad companies within state lines. They require statistical and accounting reports. They review rates and charges applicable to intrastate commerce and pass upon local complaints of inadequate or discriminatory service. In addition to acting as regulatory bodies, the state commissions often act as representatives of state business interests in transportation matters before the Interstate Commerce Commission. Sometimes the lines have been so sharply drawn that it has seemed to demand an extraordinary poise, not usually found in political bodies, to perform both functions in an entirely satisfactory manner. To be both judge and advocate—even on alternate days—calls for ability of a high order.

In some respects, indeed, the representation of state interests now transcends in importance the function in respect to regulation of local affairs. The better organized state commissions are provided with a staff of expert advisers who are equipped to investigate complaints and to advise shippers as to the merit of their grievances. The office of the state commission thus frequently becomes a clearing house for information. Moreover, in matters of general concern, it is desirable that the public, as well as particular shippers or travelers, should be represented, and that its interests should be safeguarded. Absentee regulation, without an assured representation of home interests, is almost certain to chafe. Local representation is assured by the activity of the state commissions. Matters affecting a considerable territory can hardly be decided by default against the public interest. The acrid controversies have come when adjoining states, whose shippers are frequently in competition with each other, have seemed to require the services of an umpire. Through their organizations, the state commissions are equipped to furnish adequate representation for local interests in disputes of this kind.

§ 3. When a final arbiter has been needed, it has usually been the Interstate Commerce Commission which has served. The

authority of that Commission has sometimes been invoked by parties who alleged that rates prescribed by a state commission unjustly discriminated against shippers engaged in interstate commerce. The complaint in the Shreveport Case was brought by the Louisiana Railroad Commission against railroads which, obeying an order of the Texas Commission, charged a lower scale of rates on intrastate commerce from Houston and Dallas, where the competitors of Shreveport interests had their places of business, than was in effect from Shreveport into Texas. The Supreme Court upheld the power of the Interstate Commerce Commission to remove unjust discrimination against shippers and localities engaged in interstate commerce. The intent of Congress was emphasized by an amendment to the Interstate Commerce Act contained in the Transportation Act, 1920. Congress declared that rates and charges prescribed by the Interstate Commerce Commission for the purpose of removing unjust discrimination of this character should be observed by the carriers, "the law of any state or the decision or order of any state authority to the contrary notwithstanding."

Congress has also provided that the states may regulate freight and passenger service for intrastate commerce only insofar as such regulation is not inconsistent with any lawful order of the Interstate Commerce Commission. And the placing with that body of complete control over the regulation of security issues, and of power to issue certificates of necessity and convenience as prerequisite to the construction of new lines of railroad, deals with a phase of the regulation of management long guarded by state authority.

It is not to be doubted that the interblending of operations in the conduct of interstate and local business by railroad companies is such as to necessitate the exercise of final authority by the Federal Commission if railroad regulation is to succeed. Interstate and intrastate commerce as conducted by the railroad companies utilize the same right of way, terminals, bridges, stations, locomotives and cars. The terminal facilities and connections within state lines are an aid to the carrier's entire business, and an element of value with respect to the whole property and the business in other states. Securities ordinarily are issued against the entire line of the carrier, and cannot be

divided by state lines. Freight and passenger tariffs must be made with a view to all the traffic of the railroad and should be fair as between through and short haul business. The intrastate transactions are so interwoven with the interstate commerce conducted by railroad companies that the effective regulation of the latter must control the former. Thus distribution of coal cars in times of car shortage can be effected only under one control. This principle the amended Interstate Commerce Act recognizes.

Yet there has been scrupulous care to insure adequate representation of state interests. There must be notice to the authorities of the states in which the carrier's line lies when an application to issue securities is before the Commission for approval, when the plan for the consolidation of such railroads is being formulated, and before any figure of "value" is made final in the Federal Valuation. While the ultimate power of the Federal government is recognized, the spirit of coöperation is clearly invoked. In an issue involving both state and interstate rates, conference with the state authorities is urged by the law, and joint hearings are authorized.[1] Most of the hearings on new constructions and abandonments have been held by state commissions at the request of the Interstate Commerce Commission. In the 1920 Increased Rate Case, three representatives chosen by the National Association of Railway and Utilities Commissioners sat with the Interstate Commerce Commission (at the latter's invitation) throughout the hearings and oral argument, and in all conferences. They concurred in the conclusions reached and issued a statement to state commissions throughout the country to that effect.

§ 4. It is clear, therefore, that the most important agency of railroad regulation is the Interstate Commerce Commission—the national body. This consists of eleven members, the Interstate Commerce Commissioners, who are aided in their work by a large force of experts, attorneys, accountants, statisticians, clerks and assistants. For the fiscal year ending June 30, 1921, the main-

[1] Special rules of practice governing such hearings have been announced by the Commission. The ultimate responsibility, however, rests with the Interstate Commerce Commission. See Wood Rates between North Pacific Coast Points, 61 I. C. C. 159, 163; Public Convenience Certificate to Idaho Central R. R. Co., 70 I. C. C. 265; Public Convenience Application of Atlanta & St. Andrew's Bay Ry. Co., Fin. Docket No. 1159, decided August 6, 1921, 70 I. C. C. 313.

tenance of this organization cost the Federal government \$6,193,174.54. The cost for the first full year of the Commission's existence had been less than \$100,000. But in 1887-1888, there were only five commissioners, and fewer than 40 employees. On July 1, 1922, there were 1,798 employees.

The eleven Interstate Commerce Commissioners are appointed by the President, by and with the advice and consent of the Senate, for terms of seven years. Usually, though not always, the presidential appointees have been confirmed. Commissioners receive compensation of \$12,000 annually, an amount which, combined with security of tenure of office, and a position of power and respect, has been sufficient to attract, and to hold, men of distinguished talents. It is provided by law that not more than six commissioners shall be appointed from the same political party, but reappointment, even by an adverse political party, has been the almost invariable custom. Insurance against sudden reversal of policy is also furnished by the arrangement that the terms of not more than two members shall expire in any given year. No commissioner may engage in any other business, vocation or employment. And, to safeguard against possible criticism, it is provided that no person holding any official position with the railroad companies, or owning stocks or bonds thereof, shall enter upon the duties of an Interstate Commerce Commissioner. Before such an individual could qualify for office, resignation from his position, or sale of the securities would be a necessary preliminary.

§ 5. Few men have come to the Commission with railroad experience. Men have been appointed to its membership from varied walks of life. For many years one of the best known and most highly respected members of the Commission was a man who, at the time of his appointment, was Grand Chief of the Brotherhood of Railway Train Conductors, Mr. Edgar E. Clark. His presentation of the railroad problem to the Senate Committee in 1919 was a masterly effort, analytical, critical and constructive.[1] On January 1, 1923, the membership consisted of six lawyers—the profession on which from the beginning it has drawn most largely for its membership. One of these lawyers

[1] Published as *Clark on Interstate Commerce*, with Introduction by F. B. James.

had made his mark as a representative of an aggressive shippers' organization appearing before the Commission. Another had been president of a newly built railroad in the South, the Carolina, Clinchfield & Ohio. Two members of the Commission were professional economists, former college professors; one other had been trained in the newspaper business, another in the silk business. This outline of occupations is fairly typical of the personnel of the Commission in recent years. It is probable that the public confidence in the integrity of the Commission has been fostered and maintained very largely by the method of selection, which has not limited the membership of the Commission to men of any one kind of training.

But although it has apparently been the theory that it is unnecessary to select men for these important positions because of their particular skill in railroad affairs, commissioners have been chosen to some extent because of their knowledge of the problems of railroad regulation. Six members of the Commission were formerly members of state railroad commissions. A seventh was long a member of Congress and served as chairman of the House Committee which participated in framing the Transportation Act, 1920. The economist members, who from the nature of their interests had been students of government regulation, had both served on state commissions.

In general, the members of the Commission have regarded their employment as a serious occupation requiring their most conscientious efforts in the public interest. The work incident to membership is arduous. It must combine a broad and comprehensive outlook with a mastery of detail. To be a successful commissioner, a man must rely for his reward largely upon his own belief in having done his work well. He will always be subject to criticism by those who are unable to secure the relief to which they think they are entitled.[1] In some cases this criti-

[1] "The Commission always has been, and I guess always will be, the subject of a great deal of misunderstanding and a good deal of criticism, much of which, at least, is unwarranted and unjust; but inasmuch as I am no longer a member of it I think I can with propriety point to the record that the Interstate Commerce Commission has made, the standing that it has gotten even before these railroads that used to think it was guilty of all the crimes in the decalogue—and the shipping public—and I assert that the reason that the Interstate Commerce Commission has attained that reputation and that standing is because it has stood with a face to every wind that blows and performed its duties in accord with its conscientious convic-

cism has extended even to the halls of Congress. No scandal has, however, attached itself to any member of the Commission. The Commission has been able to retain the public confidence in its efforts to accomplish the purposes outlined for it. If the railroad managers have been slower to appreciate the meaning of this studious and impartial attitude, its importance has been forced upon them by the broadening scope of legislation. Regulation is not a thing which they can take or leave.

The general headquarters of the Commission are in Washington, in an office building of eleven stories, at the corner of Eighteenth and Pennsylvania Avenue, N. W. Each commissioner, with his staff of assistants, has a suite of offices. On the top floor are the conference rooms and the argument room where, in important cases, the Commission sits, *en banc*, to hear oral arguments in respect to controversies presented to it. There are also offices of the Commission's Bureau of Accounts at New York, Chicago, San Francisco, St. Paul, Houston, Nashville and St. Louis. The field work of this department of the Commission necessarily must be done largely in the offices of the carriers.

One of the commissioners is designated Chairman by vote of his colleagues. It is the custom for each commissioner to hold the chairmanship for one year, the selection being accomplished by rotation. The Chairman is in charge of the administrative organization of the Commission, and presides on occasions when the Commission sits as a body. He is frequently called upon to represent the Commission in its dealings with the public, and before Committees of Congress. There is also a Secretary, who publishes the orders of the Commission, who acts as administrative officer of the Commission, under the Chairman's general supervision, and to whom correspondence should be addressed.

§ 6. In order to facilitate the performance of its affairs, the Commission has exercised the authorization of Congress to divide

tions of what was the right thing to do, and has not been swayed by popular clamor, by any political influences, or anything of that kind; and if the time ever comes when the Interstate Commerce Commission has to consider whether or not a thing is going to be popular and whether or not it is going to be attacked by one political party or another, its usefulness will be very seriously impaired, in my judgment."

Statement of Edgar E. Clark, formerly Chairman of the Interstate Commerce Commission, November 19, 1921, hearings on Modification of Transportation Act, 1920, before Senate Committee on Interstate Commerce, 67th Cong., 1st Sess., p. 439.

its membership into divisions consisting of not less than three members each. The senior in service acts as chairman of the division. By law, each division by majority action may hear and determine controversies, and issue orders in respect to matters presented to it in the same manner as though the action were taken by the full membership of the Commission. In matters of national interest or importance, or legal questions, it is customary for the entire membership of the Commission to act. Such cases were the Increased Rate Case of 1920 ("Ex Parte 74"), and Reduced Rates, 1922. But the general routine work of the Commission is conducted through the medium of these divisions.

Under its present organization the Interstate Commerce Commission consists of five divisions, some of the commissioners serving on more than one division. The greater number of the divisions consist of three members. All of the divisions, except Division 5, sit by monthly rotation for the purpose of hearing arguments in cases not reserved for consideration by the full Commission. The organization into divisions recognizes the threefold character of the Commission's work: the regulation of rates, service and management. The difficulty of drawing a clean-cut line between service and management is reflected by an overlapping in these two fields. The particular matters of regulation entrusted to the several divisions, in addition to the rotation in respect to oral arguments, are as follows:

Division 1:
- Management:
  - Valuation of Railroad Property
- Service (Safety):
  - Safety Appliances
  - Accident Reports
  - Hours of Service
  - Locomotive Inspection
  - Block Signals
  - Automatic Train Stops and Train Control

Division 2:
- Rates:
  - Publication and Suspension of Rates
  - Relief from the Long and Short Haul Clause
  - Reparation in Non-Contested Cases
  - Rates limiting Loss and Damage Liability

Division 3:

Rates and Service:

Formal Complaints not orally argued and not reserved by the Commission

Prosecutions and Proceedings for the collection of penalties for violation of the Interstate Commerce and Related Acts

Division 4:

Management:

Regulation of Security Issues

Certificates of Convenience and Necessity (new construction and abandonments)

Consolidation of Railroads, Leases, Stock Control

Uniform Accounts

Division 5:

Service:

Car Service

Extension of Lines

Common Use of Terminals

Physical Connection between Rail Lines and Docks

Routing of Unrouted Traffic

Priority of Transportation during War

Transportation of Explosives, etc.

These Divisions of the Commission proper consider questions of policy. The administrative routine is carried on through the agency of bureaus, each having to do with a principal function of the work. Each bureau has a single head, who reports to a commissioner, who in turn can refer matters to a division, or, if need be, to the entire Commission for determination. Where petitions for rehearing of a decision rendered by a division of the Interstate Commerce Commission are granted, the case is considered upon rehearing by the full Commission. The practice has also been adopted of permitting any commissioner, who is a member of a division considering a case, to certify the case to the full Commission. In this way it is sought to safeguard, to some extent, the uniformity of decisions and to prevent the rendition of a decision by a single division which might be contrary to views of the majority of the Commission. It is important that an effective method should be worked out along this line. Thus four out of eleven commissioners dissented from a decision of the full Commission finding that rates on live stock in

western territory were reasonable,[1] while two of these dissenting Commissioners had but shortly before constituted the majority of a division of the Commission which had found unreasonable the charges on mixed carloads of live stock in the same territory, effecting a substantial reduction in carriers' revenues.[2] The Pennsylvania lease of the Panhandle was approved by a majority of the whole Commission.[3]

§ 7. Minor administrative matters are disposed of by the commissioner in immediate charge of a bureau, although the majority of matters involving discretion are dealt with by a division. In this scheme, the guiding principle is to keep the organization as simple as possible, with centralized responsibility, and to afford a ready means to bring to bear the combined judgment of the Commission on matters of moment and general policy. Routine is handled by the subordinate officials who are relied upon to present to those who have the ultimate responsibility the results of their experience. This division of labor, after all, merely draws upon the scheme of organization generally used in large business enterprises.

The Bureaus of the Commission are thirteen in number. The scheme of organization is indicated by the table on the next page. The general public is most likely to have to do business with the Bureaus of Formal and Informal Cases. The Bureau of Formal Cases, headed by the Chief Examiner, performs functions preliminary to the decision by the Commission of controversies which are presented upon formal complaint, or upon orders of the Commission instituting investigations relating to the suspension of tariffs or to other matters. Its functions are described in detail in the following chapter on practice before commissions. The Bureau of Informal Cases handles, as routine matters, the complaints on which the railroads make no defense and the correspondence relating to requests for general information and makes informal rulings upon the respective rights and obligations of the public and common carriers under the Interstate Commerce Act. This Bureau also seeks to adjust controversies with respect to the legal charges, and, by correspondence between the shippers and

[1] National Live Stock Shippers' League *v.* A. T. & S. F. Ry. Co., 69 I. C. C. 407.

[2] National Live Stock Exchange *v.* Ann Arbor R. R. Co., 69 I. C. C. 125.

[3] Lease of Pan Handle by Penn. R. R., 72 I. C. C. 128.

INTERSTATE COMMERCE COMMISSION

BUREAUS OF THE COMMISSION	SECTIONS	HEADED BY	REPORTS THROUGH	TO
Administration		*Secretary*	CHAIRMAN *ex officio*	Commission
	Mails and Files	Chief of Section		
	Dockets	Chief of Section		
	Stenography	Chief of Section		
	Printing	Printing Clerk		
	Disbursements	Disbursing Clerk		
	Purchases	Chief Clerk		
	Appointments	Appointments Clerk		
	Indices	Chief of Section		
	Library	Librarian		
	Supplies	Chief of Section		
	Documents	Chief of Section		
Formal Cases		*Chief Examiner*	CHAIRMAN *ex officio*	Commission
	Examiners			
	Board of Review			
Traffic		*Director*	COMMISSIONER	Division 2
	Tariffs and Sixth Section matters	Chief of Section		
	Released Rates Board			
	Suspension Board			
	Fourth Section Board			
Safety		*Chief of Bureau*	2 COMMISSIONERS	Division 1
	Hours of Service			
	Safety Appliances			
Locomotive Inspection		*Chief Inspector*	COMMISSIONER	Division 1
Finance		*Director*	COMMISSIONER	Division 4
	Loans and Guaranty Securities			
	Convenience and Necessity			
Law		*Chief Counsel*	COMMISSIONER	Commission
Inquiry		*Chief of Bureau*	COMMISSIONER	Division 3
Statistics		*Director*	COMMISSIONER	Commission except Div. 4 matters
Service		*Director*	COMMISSIONER	Division 5
	Car Service			
	Transportation of Explosives and other dangerous articles			
Informal Cases		*Chief of Bureau*	COMMISSIONER	Division 2
	Informal Cases			
	Special Docket			
Accounts		*Director*	COMMISSIONER	Commission, except Div. 4 matters
Valuation		*Director*	COMMISSIONER	Division 1
Special Boards of	*Reference*			Division 2
	Referees		CHAIRMAN	Commission,
	Compensation		COMMISSIONER	Division 4

Commission Committees:

1. Salaries
2. Personnel of Examiners; Boards of Review and Reference
3. Reports and Conference Rulings
4. Rules
5. Reporting
6. Legislation
7. Honesty, Efficiency and Economy of Carrier Operation
8. Relations with the United States Shipping Board

railroads, to readjust, where equitable, disputed rate situations. The Bureau of Inquiry investigates alleged criminal violations of the Interstate Commerce Act and related acts, and assists the Department of Justice in securing indictments of shippers and carriers for such violations and in prosecuting offenders. The other bureaus operate in conjunction with the railroad managements, or in furtherance of the Commission's own activities.

[redacted]

This, then, is the instrumentality which has been set up in the public interest to regulate the railroad corporations of the United States. Its activities are manifold and its decisions affect to some degree every person living in this country. Its duties are in some respects judicial, in some administrative. It is the final arbiter on all matters of regulation of interstate railroads in the United States, excepting only as to the relations with employees. That problem has been intrusted to a separate organization created by Congress and designated as the Railroad Labor Board, the organization and work of which will be discussed in a later chapter.

One final word: regulation costs money. That cost is reflected, but not revealed, by the expense to the public treasury. The six millions and more spent by the government is by no means all. The railroads must meet a considerable financial burden. Legal departments have been expanded; statistical and accounting departments developed; much of the time of highly paid executives is consumed in attending regulatory hearings and in conference in anticipation of such attendance. It has been estimated that the Federal Valuation, which, though uncompleted, had by June 30, 1922, cost the government some $25,000,000, had cost the carriers almost $60,000,000 more.[1] Any system of regulation creates a force of inspectors within the organization to anticipate the inspection of government employees—this is true of accounting methods, of the presence of the required safety appliances, of the condition of locomotives. And always there are reports and exhibits to be made out. The following story, which appeared in one of the financial journals early in 1922, may or may not be apocryphal. At all events it illustrates why sometimes railroad managers must long for the "good old days" when railroads were looked upon as private business enterprises:

> "President Rea of the Pennsylvania not so very long ago, asked me how many reports I supposed his railroad made to departments in Washington, principally the Interstate Commerce Commission, in a

[1] "The United States Government, through that Commission, has expended on this work $23,000,000 and it is conservatively estimated that the railroad corporations have spent approximately $55,000,000 for their participation in the undertaking. The importance of the work cannot be overestimated, and its completion should be expedited as much as possible, consistent with proper and efficient conduct of the work." *Report of Joint Commission of Agricultural Inquiry; Transportation*, p. 312.

single year. Knowing how ample that railroad's reports are, I said that it might be safe to take 500 a year as all that were really needed, and multiply that figure by twenty, and ventured on that basis, an estimate of 10,000 reports for a single year. Mr. Rea laughed ruefully. He said, 'Last year we made 114,000 reports for our lines east of Pittsburgh alone!'"

The cost of regulation must be borne by the users of the railroad. Presumably the net gain is on the side of regulation.

CHAPTER III

PRACTICE BEFORE COMMISSIONS

§ 1. Regulatory commissions in the beginning were primarily administrative bodies. They seldom had power beyond the power of investigating and reporting to the public, or to legislative bodies, on the conditions which they found to exist. Therefore, the conduct of proceedings by them was informal in its nature. Later, as they became clothed with the power of affirmative action and with powers quasi-judicial in their nature, the commissions retained in large measure the informality of practice which had grown up during the period when they were merely investigating bodies. The fundamental difference which exists in the nature of the proceedings before a commission and before a court constitutes a further reason for the informality of proceedings conducted by regulatory commissions.

The litigated controversies in the courts are almost invariably conflicts between private interests, except where suits are prosecuted by the government itself, directly or indirectly. The object of law as administered by the courts is to protect persons in the enjoyment of their rights, and to penalize others who interfere with these rights. The rules of action or conduct, of which the law consists, define, limit and protect the rights of individuals living in organized society. Each time that the law declares that one person may have certain rights by conforming to certain standards, it likewise declares that other persons must respect these rights. The object of law as administered by the courts, being therefore to define rights and to protect persons in the enjoyment of these rights, the function of the courts is in essence

not only to determine what the law is, but to discover the individual's rights and duties in respect to the law.

The functions of the regulatory commission differ in this respect—that the rights and duties which it determines and enforces are nearly always clothed with a public interest. The original concept of railroad regulation sought the general protection of the public against abuses thought to have been brought about by the large organizations of capital which represented railroad investment. There has been superimposed upon this the later concept, declared in the Transportation Act, requiring determination through regularly constituted bodies representing the public, of "the transportation needs of the country and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation." [1]

It is, of course, true that many controversies of a private nature are adjudicated by railroad regulatory commissions. Yet in their final analysis, nearly all of these controversies have elements of public interest. When both elements are present, the administrative tribunal possesses the dual functions of determining the controversy and of protecting the public interest. Logically and quite properly it should not be bound by fixed rules of practice, nor should it conceive of its power of determination as limited by strict adherence to principles announced in prior decisions, the lawyer's rules of *res adjudicata* and *stare decisis*.

§ 2. There are limitations upon the extent of the informality of practice in which these commissions may indulge. They cannot deny to parties interested the right to be heard, and the hearings must be so conducted that each party will know of the evidence which will be considered by the commission in determining the issues. A clear statement of these governing rules and reasons for them has been announced by the Supreme Court in passing upon an appeal arising from an opinion of the Interstate Commerce Commission:

> "A finding without evidence is beyond the power of the Commission. An order based thereon is contrary to law and must, in the language of

[1] Sec. 15a, Par. 3, Interstate Commerce Act; Sec. 422, Transportation Act, 1920.

the statute, 'be set aside by a court of competent jurisdiction.' The Government further insists that the Commerce Act requires the Commission to obtain information necessary to enable it to perform the duties and carry out the objects for which it was created, and having been given legislative power to make rates it can act, as could Congress, on such information, and therefore its findings must be presumed to have been supported by such information, even though not formally proved at the hearing. But such a construction would nullify the right to a hearing—for manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute. . . . The Commission is an administrative body and even where it acts in a quasi-judicial capacity, is not limited by the strict rules, as to the admissibility of evidence, which prevail in suits between private parties. But the more liberal the practice in admitting testimony, the more imperative the obligation to preserve the essential rules of evidence by which rights are asserted or defended. In such cases the commissioners cannot act upon their own information as could jurors in primitive days. All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense. In no other way can it test the sufficiency of the facts to support the finding; for otherwise, even though it appeared that the order was without evidence, the manifest deficiency could always be explained on the theory that the commission had before it extraneous, unknown, but presumptively sufficient information to support the finding."[1]

The same reasoning applies to investigations by state commissions.

It has therefore been necessary for regulatory commissions to adopt certain fairly definite standards of procedure. There is some variation as between different states and as between the state commissions in general and the Interstate Commerce Commission. These differences are, however, minor rather than fundamental. It is impracticable within the scope of this discussion to deal with all the minute details of procedure before the various state commissions and to contrast them with each other and with the rules of the Interstate Commerce Commission. The rules of the procedure before the Interstate Commerce Commission have been generally followed by the several states and the discussion of these rules will suffice to outline the general subject.

[1] I. C. C. *v.* L. & N. R. R. Co., 227 U. S. 88, 92.

§ 3. Exclusive of those matters in which regulatory commissions are charged with the duty of investigating alleged violations of criminal statutes, proceedings before them may be divided for convenience into two general classes: first, controversies or investigations arising out of controversies, and second, special proceedings largely administrative in their nature. Before the Interstate Commerce Commission the controversies are of four kinds: (a) informal cases; (b) formal complaints; (c) so-called suspension cases, where the Commission upon application has suspended changes in rates proposed by the carriers; and (d) general investigations. The special proceedings cover a wide range of subjects: (1) applications for certificates of public convenience and necessity for construction or extension of lines of railroad; (2) applications for authorization to abandon existing lines of railroad; (3) applications for authorization of acquisitions or consolidations of railroad properties; (4) applications for the approval of security issues; (5) applications for permission to retain as directors or officers, individuals who hold official positions with other railroad companies. These are the subjects which come under the regulation of management. Investigations are made rather to determine facts than to decide controversies, but many of these applications, particularly those dealing with the abandonment of railroads, are bitterly contested.

The controversies have especially to do with rates and service. Informal cases cover the class of complaints which by agreement of the parties are determined without hearing and without formal complaint or formal order. These usually arise by a letter of complaint addressed to the Commission by an aggrieved traveler or shipper. This letter of complaint is referred to the carrier involved with a request for a statement in writing of the carrier's opinion of the matter with any additional facts which may not have been disclosed by the letter of complaint. If, from the carrier's reply, it appears that the letter of complaint is obviously without merit, or that the carrier is willing to accede to the demand, or that the matter may otherwise be disposed of in manner satisfactory to all parties, the Commission expresses its opinion through a letter addressed to the interested parties by the Secretary of the Commission. In the event that reparation on past shipments is sought and the carrier is willing to

admit the propriety of the demand, the Commission's rulings provide for the submission by the carrier of an application on what is known as the special docket for authority to pay the amount involved, and if upon investigation, the Commission finds no objection to such a course, it will issue proper authorization. An unauthorized payment would be illegal.[1]

The volume of matters handled in this manner is illustrated by the fact that during the calendar year 1921 the Interstate Commerce Commission received 7,811 informal complaints and handled 91,500 letters in respect to them. Orders authorizing refund of rates or fares paid were entered in 1,289 cases, covering reparation awards aggregating $789,278.23. Many of the informal complaints sought general information and informal rulings upon the respective rights and obligations of the public and common carriers under existing statutes, and where a disposition of these matters could be made by informal ruling without prejudice to the rights of others, this course was followed.

In the event that it appears from the correspondence that an informal complaint cannot satisfactorily be disposed of without a hearing, the shipper or traveler who filed the complaint is so notified. He may then elect to drop the matter, to file a formal complaint, or to continue negotiations with the railroad. Though the filing of the informal complaint has served to stop the running of the statute of limitations, the formal complaint must begin a slow and uncertain process. Each case awaits its turn, and seldom can an opinion be ground through the mill in less than ten months after the complaint is filed. In the meantime the rate alleged to be discriminatory or unreasonable (or the service charge or practice complained against) continues in effect, since both complainant and railroad remain under the legal obligation to abide by the requirements of the published tariff. If the dispute is one based upon the interpretation of a tariff, rather than upon its clear requirements, the wound is kept open. Certainty of charge quite as much as the amount of the charge is frequently an important element in business competition. During the months before the case comes up for hearing, and during the period of taking testimony and filing exhibits and briefs, a cost element affecting the quotation of prices, and, indirectly, the

[1] Penn. R. R. Co. *v.* International Coal Mining Co., 230 U. S. 184.

extent of the market to be served, must remain uncertain. A compromise once agreed upon as fair to all parties could be made effective within 30 days, and, if necessary to meet an emergency which the Interstate Commerce Commission will recognize, in less time. Hence a premium is placed upon negotiations "out of court."[1]

§ 4. Cases which are determined upon formal complaint must conform to fairly definite rules which have been announced by the Commission. It is not an essential requirement that the party filing complaint should have first submitted the matter by letter for consideration upon the informal docket. Any person may file a formal complaint, and the Interstate Commerce Act specifically provides that "no complaint shall at any time be dismissed because of the absence of direct damage to the complainant." The result is that the Commission's docket of formal complaints is a heavy one. In 1915, 964 complaints were filed; in 1916, 854; in 1917, 651; in 1918, 342; in 1919, 838; in 1920, 1040; and in 1921, 1487. In the last mentioned year the Commission conducted 1616 hearings and took approximately 185,111 pages of testimony, disposing of 1021 cases.

If each railroad could, on its own account, settle all disputes with its customers, there probably would be fewer complaints. But the very interest which binds each railroad to its own shippers, makes necessary coöperative action by all railroads whenever a change is proposed which will affect competitive interests.

[1] Even when the outcome of a formal complaint is favorable to the complainant, there is always the possibility of delay occasioned by appeal, or even of further controversy opened up by those changes in rate structure or service practice made in conformity with the Commission's order. The original complaint in the Shreveport Case was filed on March 7, 1911, and orders were entered in that case at various times between 1912 and 1922; the Transcontinental-Intermountain dispute after thirteen years remains unsettled; it is probable that the group readjustments ordered first in the Michigan Percentage Cases, and corrected after the South Bend Case, will be reflected by further changes in Indiana. A rate structure is much like a tower of cards—take away one element, and the whole structure threatens to topple. Not certainty but uncertainty may, therefore, be injected into the situation by an opinion of the Commission necessarily limited to a consideration of those elements of the situation clearly in controversy. All this implies expense as well as delay. A lawsuit is always an expensive luxury, to be avoided on that ground as well as upon the grounds of uncertainty of outcome. When, as in a contested case before the Commission, the circle of participants may be widened by the filing of intervening petitions, the danger is the greater that what seemed to be a minor affair may become one of major importance, and go far beyond the original intention.

All interested parties must agree, and sometimes such agreement can be achieved only when the decision is imposed by a governmental agency whose jurisdiction is exclusive. The hard cases are always those involving the competitive relations of business men in different localities—"local discriminations." Still for every dispute between carriers and shippers which finally goes to the Commission there are many adjusted as routine matters by the interested parties.

This is as it should be. To file a formal complaint is, after all, to start a lawsuit: a process of securing substantial justice which business men have learned to use only when all other means have failed. It is expensive and sometimes leads to unanticipated and even untoward results. A conference by clear-headed men, willing to recognize the truth, and to compromise if compromise will gain substantial ends, is frequently more effective. The rule holds in railroad rate and service disputes, as in other fields of business negotiation, that the good lawyer is not merely the man who wins lawsuits, but the man who avoids them.

Formal complaints must be typewritten or printed and should be so drawn as fully and completely to advise the parties and the Commission of the matter of which complaint is made. The names of all parties complainant and the defendants must be stated in full with the address of each complainant, and with the name and address of his attorney, if any. Each formal complaint must be accompanied by copies in sufficient number to enable the Commission to serve one upon each defendant and to retain three for its own use. Where specific violations of different parts of the Interstate Commerce Act are alleged, the facts claimed to constitute the violations must be set forth in narrative form.

Upon receipt by the Commission of the necessary copies of the formal complaint, the document is carefully scrutinized. If it conforms with the rules of practice, which the Commission has published, and which should be in the prospective complainant's hands, it is served by the Commission upon the defendant carriers by delivery of a copy to a designated service agent of each carrier in Washington, who then transmits it to his principal, or by posting in the office of the Commission's Secretary if any carrier or carriers have failed to designate agents. In general,

twenty days after service of the complaint are allowed in which to file an answer; an additional ten days being allowed those carriers whose general offices are in the Far West. While it is desirable that the carriers should answer the complaints, it is not requisite that they should, and in spite of this omission, they will be given an opportunity at the hearing to present their evidence and to participate in the proceedings as fully and completely as though they had made formal answer. The Commission, unlike the courts, does not permit a default judgment to be entered and it frequently happens that the carrier fails to file an answer, due, perhaps, to oversight or to some other unexplained cause.

§ 5. After the time for answer has expired the Commission assigns the controversy for hearing before one of its Examiners. These are employees of the Commission, nearly always lawyers, whose employment is authorized by the Interstate Commerce Act, and who preside at hearings where the evidence is received. The staff of Examiners is usually kept complete through the medium of civil service examinations. They are subordinate officers of the Commission and have no powers of decision, although they may rule upon the admissibility of evidence. The place of hearing is generally made convenient to the complaining party upon the theory that the carriers, whose witnesses and attorneys are usually regular employees, can accommodate themselves to such a place. Frequently it would be difficult for the complaining party to travel a considerable distance to present his grievance and to support it by testimony. At the hearing, the presiding Examiner states the issues which have been raised and the parties must then agree that the issues have been correctly described or else suggest modification of the issues as announced. Witnesses testify under oath and are subject to cross-examination. A party may conduct the case either in person or by an attorney. Unless otherwise directed by the Examiner, evidence is first introduced by the complaining party. The defendants are then called upon to present their evidence, which they do in similar manner. The complainant is then given an opportunity for rebuttal. If the parties desire, they may argue the case orally before the Examiner at the conclusion of the hearing. The Examiner then announces a date on which all parties who desire

to do so may file briefs, reviewing the evidence and presenting such arguments as they consider pertinent in their own behalf. These briefs, printed in conformity with the rules laid down by the Commission, must be served upon opposing parties and twenty copies must be sent to the Secretary of the Commission in Washington for use by the Commission.

At a later date, and subsequent to the filing of briefs, the Examiner's proposed report, usually in mimeographed form, is served upon all parties who appeared at the hearing. This proposed report contains the conclusions of the Examiner both as to the facts and the law applicable, together with his recommendations for disposal of the matter by the Commission. In its general form and contents this report is similar to the report of a master in chancery who has been designated by a court to conduct the proceedings in a litigated controversy. Within twenty days after receipt by the parties of this proposed report of the Examiner, they may, if they desire, file a printed statement of their exceptions to the proposed report, together with an argument in support of their exceptions. They may also, if they wish, submit a request to be heard upon oral argument before the Commission, or a division, in Washington. If oral argument is requested, the parties are advised of the date upon which they will be heard and they may submit a request for an allotment of time. The procedure at the time of argument is similar to that followed in the Supreme Courts of the several states and the United States. Parties may be heard individually or by counsel; and, at the conclusion of their argument, the case is submitted to the Commission itself for determination. If there is no oral argument, when the time in which the parties had opportunity to file exceptions has elapsed, the case goes to the Commission for decision. In complaint and answer cases no fixed time is designated in which the Commission shall determine the controversy. It depends upon the importance and difficulty of the issues involved. Sometimes the decision may be made in a few weeks; in other instances the case will remain undecided for months. The Commission announces its decision by serving copies upon the service agents of the carriers and mailing printed copies of its opinion and order to other interested parties. If either party is dissatisfied with the outcome of the case, he has

the right to apply to the Commission for a rehearing or to bring suit in an appropriate Federal court to set aside the Commission's order.

In the so-called suspension cases the procedure is similar to that followed in the formal complaint cases, except that the carriers have the burden of proceeding first with their evidence in support of the proposed changes in rates which have been suspended by the Commission. Those who have protested against such rates may then be heard. Thereafter the conduct of the controversy is precisely the same as in the formal complaint cases. In this connection, however, it is to be noted that the period of suspension is limited by the Act and that the Commission is required by law to expedite decisions in cases involving rates which have been suspended.

§ 6. The general investigations which are instituted by the Commission, either upon petition of an interested party, or upon its own motion, or in response to a request by Congress, usually include matters of wide public interest and, from a standpoint of financial magnitude, represent by far the most important of all of the Commission's work. They have dealt with rates, service and management. In conformity with the Transportation Act, 1920, the Commission, upon petition of the interested carriers, instituted a large number of investigations concerning the propriety of intrastate rates which were alleged by the carriers to result in unjust discrimination against interstate commerce. The Commission instituted investigations into service matters such as the provisions of the bill of lading; alleged discriminations by carriers in the distribution of coal cars; rules and regulations governing the transportation of inflammable articles; the installation of train control devices; and the use of power brakes. The field of management has been touched by investigations regarding the consolidation of railway properties into a limited number of systems, and the construction and repair of equipment in other than railroad shops.

In conformity with resolutions of Congress, the Commission has conducted investigations concerning payments by the United States for the transportation of mail, and rules and regulations surrounding such transportation, the causes of freight congestion during times of car shortage, the cost of railway fuel, and the

boundaries of the Standard Time Zones. The investigations into the financial management of the Pere Marquette, the Louisville & Nashville and the New Haven were also made in conformity with resolutions of Congress. The disclosure of these investigations and the recommendations outlined in the Commission's reports have frequently been used by Congress as a basis for further legislation.

The proceeding of greatest financial magnitude which has been concluded by the Commission in recent years was the proceeding known as Increased Rates, 1920, "Ex Parte 74,"[1] in which the Commission authorized, among other things, the increase in interstate passenger fares throughout the country of 20 per cent with increases in freight rates varying from 25 to 40 per cent in different parts of the United States. The hearing on this matter was conducted in Washington before the full membership of the Commission, and all parties interested were given an opportunity to present their evidence, submit briefs and be heard upon oral argument. During the hearing the Commission was assisted by a staff of experts who compiled material and analyzed the data as presented. The hearing began on May 24, 1920, and ended on July 2, 1920. The taking of the testimony covered 27 full days. The record was, therefore, a voluminous one, consisting of 42 bound volumes, aggregating five thousand typewritten pages. Evidence was presented by the railroad companies which sought to increase their rates, by interested shippers and shippers' organizations, by state commissions and other public authorities. Over two hundred appearances of counsel for interested parties are set forth in the Commission's report. At the conclusion of the evidence many parties availed themselves of the opportunity of filing printed briefs and of being heard orally before the Commission, four days being set aside for oral presentation. Thereafter the commissioners met in conference to discuss the evidence and arguments. Commissioner Hall, in testimony before the Senate Committee on Interstate and Foreign Commerce, stated that 13 full days were thus devoted by all the commissioners to conference upon the evidence. These conferences continued until July 29, 1920, by which time a report had been drafted and sent to the public printer. The report was released for publica-

[1] 58 I. C. C. 220.

tion on July 31, 1920.[1] This illustrates the nature of the proceedings by the Commission in conducting general investigations.

The special proceedings are frequently of an *ex parte* nature. They concern such matters as carriers' requests for authority to build new railroads or to abandon others, to issue securities, and to do other acts of a similar nature which are subject to public supervision. They are generally conducted before bureaus of the Commission. The Commission has promulgated a variety of forms upon which these applications must be submitted, together with an outline of the detailed facts which it requires in passing upon the matter. These instructions, issued by the Commission, must be complied with, but otherwise each of the matters of this character is dealt with largely as a matter of office routine, unless the state authorities or interested persons or localities oppose the granting of the applications. Where it appears that a certain portion of the public represented by regularly constituted authorities is interested, notice is given to them extending the right to be heard. Proceedings of this nature do not in general adopt the formal character of the formal complaints or general investigations. In the formal complaint cases and general investigations, however, when the Commission acts in its quasi-judicial capacity, compliance with rules of evidence is important. In a special proceeding it is generally acting as an administrative agency of the government. The essence of the difference lies here.

In addition to its functions in determining matters of the character outlined, the Commission also has certain duties in respect to the enforcement of criminal statutes. These also are administrative responsibilities. In such cases the actions are not brought by the Interstate Commerce Commission, but by the Attorney General of the United States, or his representative, in the name of the United States. The duty of the Commission in respect to them is to investigate, to report apparent violations to the Attorney General or his subordinates, and to assist in the prosecution.

Thus it is disclosed that practice before regulatory commissions covers a wide range of subjects, in its fullest implications, the whole field of railroad management, service and rate making.

[1] Hearings, Senate Committee on Interstate and Foreign Commerce, on Senate Bills 1150 and 2510, 67th Cong., 1st Sess., p. 675.

The practice is technical because of the nature of the subject matter and in spite of the fundamental desire for informality and the happy avoidance of the restricted rules of traditional procedure. Successful practice before regulatory commissions, therefore, requires not merely a knowledge of the statutes under which the commissions function, but also a comprehensive knowledge of the prior decisions and adjudications of these regulatory bodies. An ability to deal with statistical matter, to analyze it, and to supervise its preparation, is required, together with an understanding of the development of railroad growth and operation in the United States, in relation to the problems of regulation. He is best able to present a successful argument in a particular controversy who is best acquainted with the present and past operations and financial management of railroad companies in this country.

CHAPTER IV

THE COMMISSIONS AND THE COURTS

§ 1. The commission form of railroad regulation has not developed without interference from the courts. But, from the outset, the interference has been limited in scope. The courts have refused to substitute their judgment on questions of fact for that of the administrative tribunals set up by the states and the nation to deal particularly with railroad matters. The reason is not hard to find. Decisions of these commissions possess "the strength due to the judgments of a tribunal appointed by law and informed by experience." [1] As a practical matter, this attitude means that the conclusions of a commission on questions of fact, such as the reasonableness of rates or the existence of unjust discrimination, are accepted as final when supported by evidence and when not made under a mistake of law. The courts consistently refuse to re-examine the facts further than to determine whether or not there was substantial evidence in the record to sustain the order.[2] The Supreme Court recently reaffirmed this attitude in graphic language: "A tribunal such as the Interstate Commerce Commission, expert in matters of rate regulation, may be presumed to be able to draw inferences that are not obvious to others." [3]

But, while leaving to the special administrative tribunals exclusive jurisdiction over the technical matters of railroad regula-

[1] Illinois Central R. R. Co. *v.* I. C. C., 206 U. S. 441, 454.

[2] I. C. C. *v.* U. P. R. R. Co., 222 U. S. 541, 547.

[3] O'Keefe *v.* United States, 240 U. S. 294, 303. In Seaboard Air Line Ry. Co. *v.* U. S., 254 U. S. 57, the Supreme Court said: "Moreover the

tion, the courts have still had much important work to perform in relation to the general subject matter of railroad regulation. This work falls into four groups:

1. The interpretation of legislative acts creating the commissions and defining their powers;

2. The decision of issues of constitutional law in which the legality of the legislation whether state or national is questioned, or in which the respective powers of the state and Federal governments require definition;

3. The review of commission orders attacked as in violation of the Constitution, as beyond the commissions' statutory power, or as made arbitrarily without substantial evidence to support them;

4. The enforcement of valid orders of a commission, including, in the case of the national government, enforcement of reparation awards, against recalcitrant carriers.

The function of the courts in determining the scope and meaning of regulatory statutes is based upon the principle that a regulatory commission is a creature of statute and that the extent of its authority is to be determined by a strict construction of that statute. No powers will be implied unless clearly necessary to effectuate the expressed intention of the legislators as declared in the statute. The powers and duties of a commission are only those defined by law, and, when questions of definition arise, they must finally be determined by the courts.

§ 2. Few legislative acts are so clear and unambiguous as to preclude controversy over their interpretation. Neither the Interstate Commerce Act, nor any of the acts creating the state commissions, are exceptions to this rule. The use of such general terms as "reasonableness," "undue preference," and "unjust discrimination" has thrown open for discussion all sorts of questions of interpretation. Many of the prohibitions of these regulatory acts are couched in language which provides anything but a definite yardstick. In addition to this, it could not be expected that any set of draftsmen could prepare legislation of so novel and

determination of questions of fact is by law imposed upon the Commission, a body created by statute for the consideration of this and like matters. The findings of fact by the Commission upon such questions can be disturbed by judicial decree only in cases where their action is arbitrary or transcends the legitimate bounds of their authority."

sweeping a character as are the railroad commission acts without leaving many loopholes for controversy. It required a decision of the Supreme Court to determine whether, under the original Act to Regulate Commerce of 1887, the Interstate Commerce Commission possessed the power to prescribe reasonable maximum rates for future application.[1] The Interstate Commerce Commission had undertaken to exercise the power, but the Supreme Court differed with the Commission in the interpretation of the statute and declined to enforce the order. In so doing the Court asserted the right at the outset to interpret the Congressional act, giving consideration to what it believed was the probable intent of Congress in the light of all the surrounding circumstances.

> "Whether Congress intended to confer upon the Interstate Commerce Commission the power to itself fix rates was mooted in the courts below and is discussed in the briefs of counsel. We do not find any provision of the act that expressly, or by necessary implication, confers such a power."[2]
>
> "Moreover, it must not be overlooked that this legislation is experimental. Even in construing the terms of a statute, courts must take notice of the history of legislation, and, out of different possible constructions select and apply the one that best comports with the genius of our institutions and therefore most likely to have been the construction intended by the law-making power."[3]

When Congress later amended the law in 1906 and 1910, so as specifically to confer the power to prescribe maximum rates for the future, the Supreme Court again interpreted the statute, this time in accordance with the view adopted by the Commission.[4] Likewise, after the passage of the Transportation Act, 1920, which amended the Interstate Commerce Act in many particulars, the Supreme Court was called upon to examine and decide upon the Congressional intent. In interpreting the changes in the law, the Court held that to insure sufficient revenue for the carriers to enable them to provide adequate transportation for the country, Congress had laid a new duty upon the Interstate Commerce Commission—the duty not merely to prescribe maxi-

[1] C. N. O. & T. P. Ry. Co. *v.* I. C. C., 162 U. S. 184.
[2] 162 U. S. 184, 194.
[3] Texas & Pacific Ry. Co. *v.* I. C. C., 162 U. S. 197, 218.
[4] I. C. C. *v.* L. & N. R. R. Co., 227 U. S. 88.

mum rates after hearing and complaint concerning existing rates, but also the duty to prescribe general rate levels, both maximum and minimum, which would, in its opinion, produce such sufficiency of revenue.[1]

In many other controversies the courts have been required to construe the statutes under which the commissions function. It took a decision of the Supreme Court to establish the right of the Interstate Commerce Commission, under the statute, to compel the production of a contract between a coal operator and a railroad company which was believed to constitute a rebating arrangement.[2] In a later day, the Court was called upon to decide that the statute authorized the Commission to require a railroad president to disclose expenditures of his company in respect to supposed political activities.[3]

§ 3. Probably the most far-reaching question of statutory construction in respect to railroad regulation which has ever come before the Supreme Court was raised in the so-called Abilene Case.[4] Suit had been brought in a state court in Texas to recover damages for the exaction of an alleged unreasonable rate, although the rate charged was filed and published in accordance with law. Under the Act to Regulate Commerce, as it then stood, which in Section 22 undertook to preserve to shippers their common law and statutory remedies, the shipper argued that he had an option to resort either to the Interstate Commerce Commission or to the courts. The shipper also claimed that Section 9 of the Act enforced his right of option. Close and difficult questions of statutory interpretation were involved. But the opinion written by Mr. Justice White, who later, as Chief Justice of the United States, had much to do with the development of the Federal power of rate regulation, brushed aside the technical arguments and looked at the general purposes which Congress had sought to attain. These were described as follows:

> "That the Act to Regulate Commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference, is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the prin-

[1] R. R. Com. of Wis. *v.* C. B. & Q. R. R. Co., 257 U. S. 563.
[2] I. C. C. *v.* Baird, 194 U. S. 25.
[3] Smith *v.* I. C. C., 245 U. S. 33.
[4] Texas & Pacific Ry. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426.

cipal purposes of the act. And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all, and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law."[1]

The Court held that the statutory continuance of a right to resort to the courts was to be construed only as continuing the existence of such rights as would not be inconsistent with these fundamental purposes of the act as a whole. Only the Interstate Commerce Commission, ruled the Court, could relieve a shipper from the burden of the published rate, and then only by finding that the rate paid was either unreasonable or unjustly discriminatory. The shipper could not go into court to press his claim until he had first secured an administrative finding of fact by the appropriate commission, state or Federal. It has been urged by many that in this decision the Supreme Court usurped the function of the legislature, in that it extended the law beyond the expressed phraseology. But this is not so. The Court properly construed the law in the light of the history of the times, the purpose of the legislation, and the effect which would result from any other construction. The decision is one of the corner-stones on which present day regulation has been built.

§ 4. But, important as is this function of construing statutes, no less important is the function which the courts exercise in determining the validity of the statutes themselves—whether or not they transcend the authority of the legislatures under our constitutional system.

Some state laws regulating railroads have been set aside by the courts on the ground that they are in violation of the constitution of the state or nation. No important regulatory measure thus far enacted by Congress as a regulation of interstate commerce has met such a fate, although in some few instances the courts have given a strained construction to the statute in order to save it.[2] In dealing with state statutes, the Supreme Court of the United States has held a number void under the Fourteenth Amendment to the Federal Constitution, which restrains a

[1] 204 U. S. 426, 439.
[2] Texas *v.* Eastern Texas Railway Company, 42 Sup. Ct. Rep. 281.

state from taking property without due process of law. Statutes of Minnesota and North Dakota requiring the construction of track scales, convenient to the public, but not essential to the service of transportation, were found invalid.[1] A Nebraska statute which required a railroad company to surrender portions of its right of way for the location of commercial grain elevators was condemned.[2] A Wisconsin statute which sought to require a railroad company to keep the upper berths in sleeping cars closed when not occupied, the United States Supreme Court found invalid as taking the railroad company's property without due process of law.[3] That Court also set aside state requirements for the indiscriminate construction of switches and side tracks where made without regard to the needs of the shipping or traveling public.[4] And a state court set aside a California statute authorizing the state commission to require an extension of a railroad.[5] The "fair return on a fair value" doctrine of rate making was first announced in a case alleging violation of the Fourteenth Amendment.[6]

§ 5. Unless a "fair return" upon the "fair value" of the railroad property has been the reasonable expectation from rates set by public authority, the courts have enjoined them, as "confiscatory." Not infrequently the suits have been filed in the names of stockholders resident in another state. This was true in the case arising out of the Minnesota maximum rate law of 1907: Shepard *v.* Northern Pacific Ry. Co.[7] The issues raised were finally decided by the Supreme Court in the Minnesota Rate Cases, one of notable constitutional law decisions of recent years, and the legal doctrine there approved is now well established: "the basis of all calculations as to the reasonable-

[1] Great Northern Ry. Co. *v.* Minn., 238 U. S. 340; Great Northern Ry. Co. *v.* Cahill, 253 U. S. 71.

[2] Mo. Pac. Ry. Co. *v.* Nebraska, 164 U. S. 403.

[3] C. M. & St. P. Ry. Co. *v.* Wisconsin, 238 U. S. 491.

[4] Mo. Pac. Ry. Co. *v.* Nebraska, 217 U. S. 196; O. W. R. R. & N. Co. *v.* Fairchild, 224 U. S. 510.

[5] A. T. & S. F. Ry. Co. *v.* Railroad Commission, 173 California 577.

[6] For discussion of the origins of the "fair value" doctrine, see J. F. Swayze, "The Regulation of Railway Rates under the Fourteenth Amendment," *Quarterly Journal of Economics*, vol. 26, p. 389, and Gerard C. Henderson, "Railroad Valuation and the Courts," *Harvard Law Review*, vol. 33, pp. 902, 1003.

[7] 184 Fed. 765.

ness of rates . . . must be the fair value of the property being used . . . for the convenience of the public."[1]

The general doctrine applied by the courts to determine these questions of statutory validity upon constitutional grounds has been that railroad companies may be regulated in so far as they have undertaken to furnish particular public services. The railroad must supply facilities that are reasonably adequate; it must carry upon reasonable terms; and it must serve without unjust discrimination. These duties are called public duties, and the state and nation, within the limits of their respective jurisdictions, may enforce them. Under the Constitution, regulations may be prescribed to insure fair remuneration and to prevent extortion; to secure substantial equality of treatment in like cases, and to promote safety, good order, and public convenience in connection with transportation. But, as to matters not included within their undertaking and not concerned with transportation, the railroads' property has all the essential characteristics of private property. The government cannot confiscate the property nor require that it should be devoted to uses other than transportation. Regulation is valid only in so far as it is directed to requiring common carriers to discharge obligations which inhere in the nature of their undertaking. Beyond these public duties, the property of the railroad is private property and the courts do not hesitate to condemn statutes which overstep the bounds of regulation of the public functions of carriers.

§ 6. The greatest battles of constitutional law in respect to railroad regulation have been waged in conflicts seeking to define

[1] Smyth *v.* Ames, 169 U. S. 466, 546, sustaining Ames *v.* Union Pacific, 64 Fed. 165. The clause quoted was cited and followed by Mr. Justice Hughes, Minnesota Rate Cases, 230 U. S. 352, 434. Those interested in the detailed development of this doctrine will find such discussion in Homer B. Vanderblue, *Railroad Valuation*, Chap. I, and the cases cited.

The doctrine as thus developed was purely a doctrine of negation. A clear line of distinction has been drawn between the legislative and judicial points of view: the court can only insist that the return under schedules established by legislative order, or through the agency of a commission, shall not be "so unreasonably low as to deprive the carrier of its property without due process of law." The confiscation doctrine has, therefore, been held to set a minimum. How much more the rate of return may be, rests within the range of legislative discretion. L. & N. R. R. Co. *v.* Garrett, 231 U. S. 298, 313. See especially the cases cited at p. 314. A discussion of the legislative and judicial points of view as governing the Interstate Commerce Commission in applying the doctrine of the Shreveport Case is contained in the opinion in the Missouri River-Nebraska Cases, 40 I. C. C. 201, 254.

the state and Federal powers. Regulation by the states has been an exercise of their police power—the general legislative power of a sovereign government. On the other hand, since the national government can exercise only those powers granted to it by the states, its powers of regulation must be found in the enumerated grants in the Constitution. The Federal government possesses no "police power," as such. Regulations made by the Federal government depend upon three of the enumerated grants of power to Congress:—(a) the power to regulate interstate and foreign commerce; (b) the power to establish post-offices and post-roads and, (c) the power to prosecute war and to provide for the common defense and welfare of the country. In addition, Congress is given the power to make all laws necessary and proper to carry these powers into execution.[1]

The exclusive character of the Federal power over interstate commerce was not clearly defined in the early railroad cases. The decisions in the Granger Cases of 1876 contain dicta to the effect that not only may the states regulate intrastate rates, but that, until Congress should act in respect to interstate rates, the latter might also be regulated by the states.[2] Such a doctrine was not warranted by previous decisions construing the power of Congress to regulate interstate commerce, and it did not long survive. Since 1886 judicial interpretation of the Federal Constitution has clearly recognized the exclusive power of Congress over interstate commerce.[3] State regulation of railroad rates can in no event extend to interstate rates, directly or indirectly. The prohibition against state interference with interstate rates extends to rates applicable to any part of transportation constituting interstate commerce.[4] While the principle was thus definitely enunciated in the later cases that the states could not

[1] See Kenneth F. Burgess, "New Limitations upon State Regulation of Railroad Rates," *Columbia Law Review*, vol. 20, p. 660.

[2] "Until Congress acts in reference to the relations of this Company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern. . . . Incidentally these may reach beyond the state. But certainly, until Congress undertakes to legislate for those who are without the state, Wisconsin may provide for those within, even though it may indirectly affect those without." Peik *v.* C. & N. W. Ry. Co., 94 U. S. 164, 178; C. B. & Q. R. R. Co. *v.* Iowa, 94 U. S. 155, 163.

[3] Wabash, St. L. & P. Ry. Co. *v.* Ill., 118 U. S. 557.

[4] Louisville & Nashville R. R. Co. *v.* Eubank, 184 U. S. 27.

regulate any rate applying to interstate commerce in whole or in part, the courts, consistent with prior decisions, declined, in the absence of express legislation by Congress, to hold void regulations of purely intrastate rates on the ground that such regulations were indirect burdens upon interstate commerce.[1] It was the same with regulations of service. The states could not directly legislate with respect to the interstate operations of carriers.[2] But their regulations of intrastate transactions were not held void unless they constituted burdens upon interstate commerce.[3]

In the Minnesota Rate Cases the Supreme Court construed the Act to Regulate Commerce as it then stood as extending the jurisdiction of the Interstate Commerce Commission only over interstate commerce, but indicated that the exclusive power of Congress to regulate interstate commerce included the power to regulate the intrastate transactions of interstate carriers in so far as this might be necessary to make effective the regulation of interstate commerce.[4] In the Shreveport Case, after the Interstate Commerce Commission had made a finding that intrastate rates in Texas were unjustly discriminatory against interstate rates and had ordered the discrimination removed, the Supreme Court upheld this exercise of power over intrastate rates as a necessary incident to the power to regulate interstate commerce. The Supreme Court held that the railroad, under the Commission's alternative order to remove discrimination, had the right to raise its intrastate rates to the level of rates found reasonable for interstate commerce, even over the protest of the Texas authorities. Critics of the Supreme Court suggested that the Court by this decision had, in effect, legislated out of the Act the clause in Section 1, purporting to restrain the Commission from dealing with intrastate commerce. Again it must be said, however, that the decision of the Supreme Court properly interpreted the statute in the light of the necessities of the situation.[6] To have held otherwise would have been to have nullified the

[1] Smyth *v.* Ames, 169 U. S. 466.
[2] Atlantic Coast Line R. R. Co. *v.* Wharton, 207 U. S. 328.
[3] Southern Ry. Co. *v.* King, 217 U. S. 524.
[4] 230 U. S. 352, 399.
[5] Houston E. & W. T. Ry. Co. *v.* U. S., 234 U. S. 342.
[6] Wm. C. Coleman, "Evolution of Federal Regulation over Intrastate Rates," *Harvard Law Review*, vol. 28, p. 34.

prohibition of Section 3 of the Act against unjust discrimination of any kind. As thus interpreted, the Court upheld the constitutionality of the incidental regulation of intrastate commerce by the Federal government. The constitutionality of the Federal action was grounded upon the power to regulate interstate commerce effectively.

During the period of Federal control of railroads, the Supreme Court held that the war power of the Nation was broad enough to control exclusively both the interstate and intrastate functions of the common carriers.[1] It was not necessary as a part of the exercise of this power that the regulation of intrastate rates should be incidental to the effective regulation of interstate rates. As a war measure, Congress could regulate both directly.

After the enactment of the Transportation Act, 1920, the Court upheld the assertions of power by Congress to delegate to the Interstate Commerce Commission the right to prescribe the actual intrastate rates necessary, in its opinion, to remove unjust discriminations against interstate commerce, "the law of any state or the decision or order of any court to the contrary notwithstanding."[2] The right of the Interstate Commerce Commission to establish general rate levels was thus sustained. The Interstate Commerce Commission could define the general level of all rates necessary to produce adequate revenue and was directed to prescribe the interstate rates upon this basis. If the states failed to conform thereto, the Interstate Commerce Commission could then prescribe the intrastate rates necessary to remove the consequent unjust discrimination against interstate commerce. While this exercise of power might have been upheld under the war power, one purpose of the Transportation Act, 1920, being to terminate Federal control,[3] the Court placed the constitutionality of the new regulation squarely upon the power of Congress to regulate interstate commerce effectively.

[1] Northern Pacific Ry. Co. *v.* N. D., 250 U. S. 135; see also, Henry Wolfe Bikle, "State Power over Intrastate Railroad Rates during Federal Control," *Harvard Law Review*, vol. 32, p. 299.

[2] R. R. Com. of Wis. *v.* C. B. & Q. R. R. Co., 257 U. S. 563.

[3] "The power [war power of Congress] is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict and to remedy the evils which have arisen from its rise and progress." Stewart *v.* Kahn, 78 U. S. 493, 507. See also Hamilton *v.* Kentucky Distilleries & Warehouse Co., 251 U. S. 146, 161.

In determining these conflicts of constitutional law the function of the courts has been decisive. Their tendency throughout has been to uphold as lawful whatever assertions of power Congress undertook to make. Transportation by railroad is a matter of grave national concern. When local interests conflict with national interests, the former must yield.

§ 7. The third function of the courts in connection with railroad regulation has been to review orders of the regulatory commissions. Some of the state statutes provide a direct appeal to the courts from orders of their state commissions. No such right of direct appeal from orders of the Interstate Commerce Commission exists, but an aggrieved party may file a bill for injunction in an appropriate Federal court against any affirmative order.[1] No such action may be taken, however, if the Commission's order merely denies a shipper the relief sought and dismisses his complaint.[2]

When the validity of the orders of regulatory commissions have been assailed in the courts, the tendency of the judiciary has been to refuse to review the findings of fact. The determination of the reasonableness of rates and the existence of unjust discrimination call for the exercise of judgment. They are the same sort of issues of fact, except that they involve the exercise of more technical skill, as are passed upon by juries under our judicial system. The courts will not undertake to substitute their own judgment on these matters of fact for that of the administrative tribunal of technical experts to which Congress and the state legislatures have entrusted these questions.[3] If the

[1] District Court Jurisdiction Act, 38 Statutes at Large 219.

[2] Procter & Gamble Co. *v.* U. S., 225 U. S. 282.

[3] "In view of the doctrine announced in Interstate Com. Com. *v.* Illinois Central R. R., 215 U. S. 452; Interstate Com. Com. *v.* Delaware, L. & W. R. Co., 220 U. S. 235; Interstate Com. Com. *v.* Louisville & Nashville R. R. Co., 227 U. S. 88, it plainly results that the court below, in substituting its judgment as to the existence of preference for that of the Commission on the ground that where there was no dispute as to the facts it had a right to do so, obviously exerted an authority not conferred upon it by the statute. It is not disputable that from the beginning the very purpose for which the Commission was created was to bring into existence a body which, from its peculiar character, would be most fitted to primarily decide whether from facts, disputed or undisputed, in a given case, preference or discrimination existed. East. Tenn., etc., Ry. Co. *v.* Interstate Com. Com., 181 U. S. 1, 23-29. And the amendments by which it came to pass that the findings of the Commission were made not merely prima facie but conclusively correct in case of judicial review, except to the extent pointed out in the Illinois

Commission has erroneously interpreted the law applicable and has issued an order which is confiscatory under the Constitution, or has conducted a hearing in such a manner as to deprive a party of the right to be heard, to cross-examine opposing witnesses and to have orders made only upon substantial evidence, the courts will protect the rights of injured parties and set aside the Commission's order.[1]

§ 8. The fourth function of the courts is to enforce valid orders of the Commission, including reparation awards. The District Courts of the United States are given jurisdiction, upon the application of the Attorney General of the United States at the request of the Commission, to issue writs of mandamus commanding a railroad company to comply with valid orders of the Commission.[2] The Attorney General may also prosecute railroad companies and their officers for violating the Federal law, the courts having power to impose fines.[3] In some instances imprisonment of individuals is provided as the penalty.[4]

§ 9. Of especial interest to shippers is the grant of power to the Commission to award damages to any party complaining of the violation by carriers of provisions of the Act. In such cases the Commission makes a finding of the amount of damages and enters an order directing the carrier to pay to the complainant the sum to which he is entitled on or before the day named. The Commission is given no power to force the carrier to pay such an award of reparation, but in the event of non-payment the shipper is given a right, within one year from the effective date of the order, to sue in a District Court of the United States for

Central and other cases, *supra*, show the progressive evolution of the legislative purpose and the inevitable conflict which exists between giving that purpose effect and upholding the view of the statute taken by the court below. It cannot be otherwise, since if the view of the statute upheld below be sustained, the Commission would become but a mere instrument for the purpose of taking testimony to be submitted to the courts for their ultimate action." U. S. *v.* L. & N. R. R. Co., 235 U. S. 314, 320.

[1] "The determination of questions of fact is by law imposed upon the Commission, a body created by statute for the consideration of this and like matters. The findings of fact by the Commission upon such questions can be disturbed by judicial decree only in cases where their action is arbitrary or transcends the legitimate bounds of their authority." Seaboard Air Line Ry. Co. *v.* U. S., 254 U. S. 57, 62; see also, I. C. C. *v.* L. & N. R. R. Co., 227 U. S. 88; Penn Co. *v.* U. S., 236 U. S. 351, 361.

[2] Interstate Commerce Act, Sec. 20, par. 9.

[3] Interstate Commerce Act, Sec. 10, Elkins Act, 32 Stat. at L. 847.

[4] Interstate Commerce Act, Sec. 16.

the amount of the award. In the event that the court sustains the order and enters judgment upon it, the shipper may be allowed also a reasonable amount as his attorney's fee in the court proceeding.[1] Judgments of the court may be enforced by levying upon the railroad's property or in any of the usual methods by which court judgments are enforced. When suit is brought upon a reparation award of the Commission, the finding of the Commission as to the fact and amount of damages is considered *prima facie* true.[2] The burden is upon the carrier to rebut this presumption.

Where an award of reparation is given in connection with a finding of *unjust discrimination* the courts have held that the same degree of proof of damage is required to support an order of the Interstate Commerce Commission as would be required to support a jury finding of injury and damage.[3] Having paid only the lawful rate the shipper is not overcharged, but his damage, in a case of unjust discrimination, arises because the published rate of his competitor is unduly preferential. His damages may be the difference between the rate which he paid and a non-discriminatory rate, or his damages may be greater or less than this difference. The amount of the damage depends upon the particular facts and his right of recovery is limited to his pecuniary loss. Building upon the decision of the Supreme Court, the Interstate Commerce Commission has declared, in connection with reparation for unjust discrimination, that "proof of the damages resulting from the wrongful act of the carrier must be by such evidentiary facts as would be required to sustain such a recovery before a court of law. . . . The complainant must show how the discrimination found to exist affected him to his damage. In other words, he must establish the *fact* of his damage as well as the *amount* of damage he claims."[4]

But where the award of reparation is made on the basis of a finding of *unreasonableness* of the published rates, the rule in respect to proof of damages is different. The court presumes that, by the payment of unreasonable freight rates, the shipper who has paid them, has been damaged to the extent of their un-

[1] Meeker & Co. *v.* Lehigh Valley R. R. Co., 236 U. S. 412.
[2] Interstate Commerce Act, Sec. 16.
[3] Penn. R. R. Co. *v.* International Coal Mining Co., 230 U. S. 184.
[4] New Orleans Board of Trade *v.* I. C. R. R. Co., 29 I. C. C. 32, 33.

reasonableness. He is not required to prove any other *fact* of damage than that he has paid the unreasonable freight charges. If the Commission awards reparation to him on this basis, the courts will uphold the award.[1] The Commission does not always award reparation upon finding that a rate is unreasonable. It has reserved the right to decline to award reparation in some cases, especially when an entire rate structure is revamped.[2]

A reparation order of the Interstate Commerce Commission is a condition precedent to recovery in court for damages arising from the payment of a published rate.[3] Only in the case where damages are sought in the courts by reason of a departure by the carrier from a published rule or practice, can damages be recovered without first resorting to the Interstate Commerce Commission.[4] When resort is made to the Interstate Commerce Commission, it has the power under the law to award all damages of every kind and nature resulting from a violation of the Act.[5] Suits may be brought in the courts without resort to the Commission where the damage is one of "straight overcharge,"—that is, where the carrier has collected more than the published tariff.[6] In this connection the courts assert the right to construe the published tariffs of the carriers to determine whether or not there has been such a straight overcharge.[7] The Interstate Commerce Commission has held that its jurisdiction does not extend to claims for loss, damage and delay, these being matters for the courts.[8]

[1] Southern Pacific Co. *v.* Darnell-Taenzer Co., 245 U. S. 531; Spiller *v.* A. T. & S. F. Ry. Co., 253 U. S. 117.

[2] Missouri River-Nebraska Cases, 40 I. C. C. 201, 260.

[3] B. & O. R. R. Co. *v.* Pitcairn Coal Co., 215 U. S. 481; Mitchell Coal & Coke Co. *v.* Penn. R. R. Co., 230 U. S. 247.

[4] Robinson *v.* B. & O. R. R. Co., 222 U. S. 506; Morrisdale Coal Co. *v.* Penn. R. R. Co., 230 U. S. 304.

[5] Louisville & Nashville R. R. Co. *v.* Ohio Valley Tie Co., 242 U. S. 288, 291.

[6] Louisville & Nashville R. R. Co. *v.* Cook Brewing Company, 223 U. S. 70.

[7] G. N. Ry. Co. *v.* Merchants' Elevator Co., 42 Sup. Ct. Rep. 477.

[8] Atlas Portland Cement Company *v.* L. V. Ry. Co., 32 I. C. C. 487; Buss Company *v.* N. Y. C. R. R. Co., 45 I. C. C. 161.

In order to restrict claims for loss and damage, it has long been the policy of the carriers in their tariffs and bills of lading to provide for the limitation of liability in certain circumstances. Where the value of a concentrated commodity which can easily be carried away is high, there is great likelihood of damage from pilferage; Silk Asso. of America *v.* Penn. R. R. Co., 44 I. C. C. 578, 580; 50 I. C. C. 50; see also Director General *v.* Viscose Co., 254 U. S. 498. One form of limitation of liability which the courts up-

In recent years the Interstate Commerce Commission, in its annual reports, has recommended that it be relieved of the burden of awarding reparation and that the matter of reparation be placed wholly with the courts with a finding by the Commission of unreasonableness of rates as a condition precedent to recovery. The Commission has recommended that the law be changed affirmatively to recognize that private damages do not necessarily follow all violations of the act, and that persons should be entitled to reparation only to the extent that they have suffered actual damage.[1] The effect of amendment of the law in these terms would be to make the rule of the Supreme Court in reference to damages for unjust discrimination apply to all damages which could be recovered for any violation of the act, including the charging of unreasonable rates. The shipper would have to prove, not merely the payment of unreasonable rates, but actual damage, that is, that he had not passed the unreasonable charge on to some other person.

held was through the medium of making two sets of rates, one under which the carrier assumed full liability for loss and damage through negligence, and a lower rate where the shipper agreed to a "released valuation," or a limitation of liability; Adams Express Co. *v.* Croninger, 226 U. S. 491. Under the Cummins amendments to Section 20 of the Interstate Commerce Act, amendments of March, 1915, and August, 1916, such ratings must be authorized by the Commission before they can be lawful; Interstate Commerce Act, Section 20, par. 11; Williams Co. *v.* H. & N. Y. T. Co., 48 I. C. C. 269; Buckeye Cotton Oil Co. *v.* G. M. & N. R. R. Co., 50 I. C. C. 32; Gold Hunter Mining Co. *v.* N. P. Ry. Co., 63 I. C. C. 234. The carrier may not divest itself of liability for full actual loss on "ordinary live stock." In re Bills of Lading, 52 I. C. C. 671, 708; Perishable Freight Investigation, 56 I. C. C. 449, 482; North Packing & Provision Co. *v.* C. M. & St. P. Ry., 69 I. C. C. 235. On commodities other than ordinary live stock the Commission may validate rules governing released valuation under the tariffs, and such authorizations have been extended in connection with the transportation of ores of high value, rugs, and, in some instances, household goods. Released Rates, 43 I. C. C. 510; Silk Asso. of America *v.* Penn. R. R. Co., 50 I. C. C. 50; U. S. Industrial Alcohol Co. *v.* Director General, 68 I. C. C. 389.

[1] 33d Annual Report I. C. C. (1919), p. 17; 34th Annual Report (1920), p. 78; 35th Annual Report (1921), p. 58.

PART II

RATES

CHAPTER V

THE RATE MAKING POWER

§ 1. Railroad rates in the United States were originally established by voluntary action of the railroad companies. The rate structures were created through a competitive system of rate making. At first the principal concern of the public was the assurance that there should be free play of competitive influences. Public interference sought to prevent secret agreements between railroad managers in respect to pooling, dividing traffic or eliminating competition by special contracts.[1] Later the competitive system resulted in other evils and the public imposed the additional requirements that everyone should pay the published rates, and that no secret rebates should be extended to favored shippers; that rates should not be unreasonably high; and that unjust discriminations against persons or localities should not be created or continued. In spite of these limitations upon the operation of the competitive system of rate making through voluntary action of the carriers, the Interstate Commerce Commission was given no power until the enactment of the Transportation Act, 1920, to prescribe in the first instance what given rates should be.

§ 2. Indeed, when the Interstate Commerce Commission was created it was given no rate making power whatever, although it early asserted that it might, after condemning a rate as unreasonable, establish a reasonable rate for the future. That power the Supreme Court in 1897 decided the Commission never

[1] For a contemporary account of hostile public sentiment when the openly acknowledged combination for maintenance of rates on business between the West and the Seaboard was first attempted, see the discussion of the "Saratoga Conference" of 1874, in Charles Francis Adams' *Railroads: their Origin and Problems*, p. 150.

had. Until 1906, therefore, the Commission was without power to dictate what rates should be charged in the future. It could condemn as to the past, but the railroad managers were under no duty to accept its findings of reasonableness or discrimination for future application. By the Hepburn Act of 1906, amending the original Act to Regulate Commerce, the Commission was given power to fix the maximum rates and to require the removal of particular unjust discriminations and preferences which it found to exist. Its orders became binding upon the carriers for a period of two years from their effective dates. In 1910 the Commission was given the further power of suspending schedules containing new rates, or regulations affecting rates, for a specified period during which to investigate and determine their propriety, and as a result of such determination, either to permit the advances to be made effective, or to require them to be canceled. But the Interstate Commerce Commission did not establish rates in the first instance, nor had it any power to publish railroad tariffs. Its power, until the enactment of the Transportation Act, 1920, was strictly one of review. Only after 1906 had it any power to give future effect to its findings and orders. Even the Transportation Act gives the Commission only the power to prescribe rates, not to publish them.

§ 3. The publication of rates—that is, the printing, posting and distribution of the tariffs setting forth the rates, fares and charges—is today, as it has always been, the work of the railroad companies. While the courts have continued to hold the railroads subject to the Sherman and Clayton Anti-Trust Acts in so far as they might combine in the publication of rates to restrain trade unreasonably, the Interstate Commerce Commission has recognized the necessity of certain concert of action in the physical preparation of railroad tariffs. While some rates are published in the separate issues of individual carriers, by far the greater number of rates are to be found in the so-called agency issues. By administrative rulings the Commission has authorized railroad companies to designate tariff publishing agents, a single agent generally representing all lines in a given territory or rate making group. This agent acts under the direction of the carriers and issues a tariff in accordance with instructions from them. This names rates applicable between different points over all

competitive railroads, or, if one or more carriers does not desire to join in the rates, an exception is noted and published. In this way such simplicity of tariff publication has been secured as would have been utterly impossible if each carrier had been required to act separately and alone in the matter of publication of rates.

It is sometimes asserted that the agency method of tariff publication is carried on in the teeth of the anti-trust acts.[1] But this is not so, for tariff publication is strictly controlled by rulings of the Interstate Commerce Commission and can only be utilized to the extent and in the manner authorized by it. Furthermore, with the power of the Interstate Commerce Commission not limited to review of rates, but extended to cover suspension of both advances and reductions, it could hardly be said that this concert of action in the physical preparation of the rate books which constitute the tariff publications could result in such an *unreasonable* restraint of trade as would be illegal.[2] On the contrary such authorization in respect to agency publication is only sound administrative policy because of the great volume of detail involved.

§ 4. Tariff publication is, however, merely the manifestation of the exercise of the rate making power—the result, not the power itself. The rate making power has had three phases of development; first, the voluntary action of competing carriers—unrestrained competition; second, the competition subject to review by public authority; and third, as contained in the Transportation Act, 1920, the delegated power to a regulatory commission itself

[1] In 1899, when the carriers filed a new Official Classification, shippers petitioned the Commission insisting that the joint action was contrary to the Anti-Trust Act, as interpreted in the Trans-Missouri Case, 166 U. S. 290, and in the Joint Traffic Association Case, 171 U. S. 505. The Commission, because not charged with any duty under the Anti-Trust Act, referred the matter to the Attorney General, who ruled that the character of the transaction gave no basis for suit. 13th Annual Report I. C. C. (1899), pp. 12–20.

The proposed advances of 1910 were restrained by a temporary injunction, upon suit by the Attorney General, alleging that the increased rates were the result of a combination and conspiracy in restraint of trade and in violation of the Sherman Anti-Trust Act. Advances in Rates—Western Case, 20 I. C. C. 307, 310.

[2] In Keogh *v.* C. & N. W. Ry. Co., decided by the United States Supreme Court, November 13, 1922, a shipper was denied the right to recover damages under the Sherman law on the allegation that the published rates were the result of illegal agreement between the carriers. In such a case, declared the Court, only the government could take action against the carriers by injunction or fine; the shippers under the law must pay the published rates.

to initiate rates under certain conditions to the exclusion of voluntary action by the carriers. In the first two phases of rate regulation, the initial rate making power was lodged in the carriers; in the third the public, through the Interstate Commerce Commission, has asserted its right to exercise the power. But even in this last phase, as crystallized in the Transportation Act, 1920, the exercise of power by the Commission gives promise of concerning itself primarily with the establishment of general rate levels and leaving to the carriers much the same power in respect to particular rates and special rate adjustments within a territory as they had under the second phase of regulated competition. While the Transportation Act specifically recognizes the economic necessity of uniform rates on competitive traffic, it undertakes, wherever possible, to retain the benefits which in the past have flowed from competition between carriers.[1]

§ 5. The original Interstate Commerce Act, then, did not grant the Commission, even when acting in the capacity of a reviewing agency, the power to direct what rates should be published. When the pretension to such power which the Commission set up, based upon the contention that the power to fix rates must be implied from the general responsibility to execute and enforce the law, was denied, the Commission could appraise and condemn the wrong, but it could not prescribe the remedy. It possessed only the power to "scold." [2] Frequently it stated what, in its opinion, would constitute a reasonable rate; but the railroads might, if they chose, meet the requirement of the law by

[1] Sec. 15a, Interstate Commerce Act (Sec. 422, Transportation Act, 1920), provides in part: "Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation. . . ." Then follows the provision for the recapture of excessive earnings of particular carriers. The point here made is the recognition of the necessity of uniform rates.

Sec. 5, Par. 4, Interstate Commerce Act, as amended by the Transportation Act, 1920, provides in part: "The Commission shall, as soon as practicable, prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems. In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible. . . ."

[2] A. B. Stickney, *The Railway Problem*, p. 207; an incisive volume, by a one time president of the Chicago Great Western, published in 1891. The Supreme Court opinion was handed down in 1897: The Maximum Rate Case, I. C. C. *v.* C. N. O. & T. P. Ry. Co., 167 U. S. 479.

publishing a rate but slightly less than the rate condemned. A new complaint and a new decision would be necessary. The Commission has not recorded evidence of actual bad faith; but it did, from time to time, indicate that the effectiveness of its control over rates, especially the ability to protect from extortion, was limited because it could not set maximum rates. The Hepburn Amendment of 1906 contained the necessary grant of power; the Commission might fix maximum rates in place of rates condemned as unreasonable or unjustly discriminatory. At first the power could be exercised only after investigation made upon the Commission's own initiative. In practice, the naming of maximum rates has generally meant fixing the absolute rate, because the carriers which had fought a reduction in rates would not adopt a rate lower than one which they were establishing under compulsion.

The power to fix maximum rates reached one phase of the problem; it made possible the protection of the user of the railroad against unreasonable exactions. This, indeed, in 1900-1906, when the battle for the Hepburn Amendment was being waged, seemed the important factor; for the "harmony of management," incident to the railroad consolidations of the first years of the century, was making itself felt in rate advances.[1] But the business man is interested in the freight rates which his competitor must pay quite as much as he is concerned with the rates he must himself pay. In the competitive field of business, the practical problem is usually not created by the absolute level of rates, but by the relative charges paid to a common market, or from alternate sources of supply. The problem of regulation is not alone that of preventing extortion, but of preventing unjust discrimination, or undue preference. Fixing maximum rates did not give control over the latter problem if the preference and prejudice resulted from unduly low rates of one competitor. Complete control over the discrimination problem, in so far as it is concerned with published rates, required the power to fix minimum rates and absolute rates. Without these powers, the Commission, when it had condemned a rate adjustment as discriminatory, frequently left to the carriers the method of removing the

[1] "Harmony of management" was Mr. Harriman's phrase. Consolidation and Combination of Carriers, 12 I. C. C. 277, 304.

unjust discrimination indicated: they might advance the preferential rates or lower the rates which were discriminatory because relatively too high. On other occasions, a reasonable "relative" adjustment was prescribed, really a nondescript phrase, since the essence of discrimination is relativity or comparison. But the Commission was applying the power which it possessed to the practical problem faced. Such lack of definiteness need no longer appear; the Act of 1920 gave the Commission power to fix the absolute or minimum charges; these being set, a particular relative adjustment is effected.

§ 6. The power of the Commission over tariffs established by the carriers is not limited to a consideration of rates already being charged. The Commission may act in advance of the effective date of new rates. In handling problems of general public importance, indeed, it has even initiated investigations and indicated the character of new rate scales and adjustments which would be acceptable. In Reduced Rates, 1922,[1] this was done in advance of the publication of tariffs in order that the carriers might proceed on sure ground in issuing their schedules. Without such assurance there would be the possibility that the Commission might "suspend" the rates. For, since 1910, the Commission has had power to suspend new rates whenever their reasonableness or non-discriminatory character was questioned. No obligation rests upon the Commission to suspend new rates, nor will it do so without cause; but the suspension power makes it possible to prevent violations of the principles of the Act. The undoubted purpose of the power was the suspension of advances in rates. That the ten year period after 1910 was a period in which rising railroad costs furnished the motive for seeking to advance rates, tended to minimize the phase of the suspension power which in a period of falling prices would become of general significance; the power to suspend rates in order to prevent apparent discrimination. Whether the Commission, prior to 1920, had the power to suspend reduced rates on the ground that a discrimination was threatened by the reduction, is not now significant. Under the amended law, the full power has been exercised. Just as the suspension power has in the past been exercised to hold down advances, it should, if the future brings considerable declines in

[1] Reduced Rates, 1922, 68 I. C. C. 676.

the price curve, operate to hold rates upon existing levels. Especially would this be true when the proposed reduction covered only a small portion of highly competitive consuming or producing areas.[1]

It is clear, however, that the original suspension power was aimed primarily at unreasonably high rates, not at rates unduly discriminatory. The Commission felt that if rates could be suspended during investigation, it would be possible to prevent charging unreasonable rates, with resultant complaint and the necessity for a reparation order. Because freight charges usually are "passed on" to consumers, who have no standing before the Commission, since they are not parties to the transportation contract, those most injured by the high rate can not be recompensed. Reparation paid to the business man who pays the charge, represents an "unearned" profit. Or if, on the other hand, the business man finds his market circumscribed because of a discrimination created by the newly established advanced rates, and he loses business, it is extremely difficult to prove damage equal to the real loss. To suspend new rates, pending investigation, shifts the burden to the railroads.

The result was real injustice to the railroads which the amendment of 1920 recognized. Rate suspensions were prolonged, and, when advanced rates had been finally granted, the railroads had no recourse to secure "underpayments" for the difference between the new rate which had been found reasonable and the old, recognized to have been unduly low. Prior to 1920, the original suspension period was 120 days, with provision for an extension of

[1] When, late in 1921, the newly acquired Ford road, the Detroit, Toledo & Ironton, sought to reduce rates from coal fields on its line to Detroit, the rates, first suspended, were, after investigation, ordered cancelled, because low D. T. & I. coal rates were "interwoven" in a rate structure, which would be disrupted. Coal from D. T. & I. Mines, 64 I. C. C. 564, 566; another case is Reduced Rates on Coal to Kansas City, 66 I. C. C. 457, citing Suspension of Rates on Packing-House Products, 21 I. C. C. 68, in which the power was asserted, though not exercised. In Wickwire Steel Co. *v.* N. Y. C. & H. R. R. R. Co., 30 I. C. C. 415, it was asserted that the power had on occasion been exercised. In Skinner & Eddy Corporation *v.* U. S., 249 U. S. 557, 565, before the grant of new powers to the Commission in 1920, the Supreme Court said: "But the main source of the Commission's influence to prevent excessively low rates lies in its power to prevent unjust discrimination, . . . The order prohibiting the unjust discrimination, however, leaves the carrier free to continue the lower rate; the compulsion being that if the low rate is retained the rate applicable to the locality or article discriminated against must be reduced."

six months. Since the rates were filed 30 days in advance of effective date, this gave a period of eleven months for investigation. The law's delay was irritating to the railroad managers. It was unjust to the railroads. Now the original suspension period is 120 days, with provision for an extension period of 30 days. After this time, the rate or regulation becomes effective automatically if the Commission has not yet passed upon the problem. The shortened period of suspension, therefore, seeks to minimize the hardship on the railroads, in the event the new rates are ultimately justified. Coupled with the change, is a clause to protect the shipper; the Commission may order a strict accounting of the amounts collected because of disputed advances, and, subsequently, if the advanced rates are found unreasonable, may order a refund (with interest) of the amounts collected in excess of the rates or charges found justified. But this requirement is not iron-clad; the Commission *may* make such orders; but it need not do so. An exercise of discretion is called for. After the price advances which culminated in 1920 it was the railroad, not the shipper, which needed help.

It was inevitable that the Commission should have been slow to approve general advances in rates. The business interests took full advantage of the strategic position which they occupied. The burden of proof rested with the carriers; and those opposing advances contented themselves with pointing out apparent waste. Mr. Justice Brandeis, serving as counsel for shippers in 1910-11, startled the imagination of the business world by talking of economies of $1,000,000 a day from widespread introduction of scientific management. In the Five Per Cent Case, the shippers focused their energies on the alleged unremunerative and wasteful practices of the carriers. As a result, the Commission in 1914, although finding that the income of the carriers was smaller than was demanded in the public interest, refused to approve the

[1] The amendment of 1910 established another principle which operates to the advantage of the user of the railroad whenever the reasonableness or discriminatory character of a rate advanced since Jan. 1, 1910, is under investigation. Since practically all present-day rates were advanced in the general percentage advances of 1918 and 1920, the principle is of widespread application. The burden of proof rests on the railroad to justify all rates advanced since Jan. 1, 1910. The risk of non-persuasion rests on the carriers: Burson Knitting Co. *v.* C. M. & G. Ry. Co., 42 I. C. C. 739, 741; Traffic Bureau, Toledo Commerce Club *v.* C. H. & D. Ry. Co.; 43 I. C. C. 446, 457.

proposed advances. Instead there was extended obvious good advice on economy.

The carriers, on the other hand, seldom presented a unified front; nor were their cases complete logical units. They based their pleas for advances upon the need to maintain railroad credit. They did not, until bitter experience had taught the necessity, seek to prove that the particular rates which it was proposed to advance were unduly low. The Commission had at once denied its responsibility to protect the revenues of the carriers.[1] The burden was later assumed reluctantly, and not without clear exposition of a cleavage of opinion within the Commission.[2]

§ 7. Just when the issue must have been forced by inevitable wage adjustments came the war and the aftermath. The weakness of the law was recognized, and the Transportation Act of 1920 included a rule of rate making:

> "In the exercise of its power to prescribe just and reasonable rates, the Commission shall initiate, modify, establish, or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income, equal as nearly as may be to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation."

This, it should be clear, is not in any sense a guarantee of earnings. Indeed, the carriers, as a whole, operating during 1921 with rates established in 1920 under the authority of the Commission

[1] "We must not regard too seriously, however, the effort of railroad counsel to establish this Commission *in loco parentis* toward the railroads. We must be conscious in our consideration of these rate questions of their effect upon the policy of the railroads and, ultimately, upon the welfare of the state. This country cannot afford to have poor railroads, insufficiently equipped, unsubstantially built, carelessly operated. We need the best of service. Our railroad management should be the most progressive. It should have wide latitude for experiment. It should have such encouragement as would attract the imagination of both the engineer and the investor. Nevertheless, it is likewise to be remembered that the government has not undertaken to become the directing mind in railroad management. We are not the managers of the railroads." Advances in Rates—Western Case, 20 I. C. C. 307, 317.

[2] See, for example, the majority and dissenting opinions in the Five Per Cent Case, 31 I. C. C. 350, 32 I. C. C. 325; Western Advanced Rate Case of 1915, 35 I. C. C. 654; the Fifteen Per Cent Case, 45 I. C. C. 303.

never, in a single month, showed a return, which, calculated on a yearly basis, represented more than 5.4 per cent on the value of the property as fixed in the Increased Rate Case. In January and February, 1921, there was an actual deficit and the total return for the year was 3.31 per cent.[1] The law fixed 5½ per cent as a fair rate of return until March, 1922, and permitted an allowance of an additional ½ per cent for additions and betterments. Under the circumstances, this extra ½ per cent meant nothing.

The rule of rate making, however, meets the problem only in general terms. It is concerned with the level of rates, not with the small group of individual charges which create the business problems for the average user of railroad service. Nor does it supersede the general requirement of the law that individual rates must be reasonable. The amendment of 1920 frankly recognized the dual problems involved in fixing railroad rates. The rule of rate making alone is inadequate. The Commission was therefore granted "reasonable latitude to modify or adjust any particular rate" found unjust or unreasonable. This grant of power, a reiteration of a basic principle of the Act, completes the control of rates by the Commission. Its responsibility includes the securing of an adequate return to the owners of a railroad; and it may direct how individual rates shall be modified, fixing either maximum, minimum or absolute rates, to be established in place of those condemned as unreasonable or unjustly discriminatory.

The Commission has not sought to revamp the entire rate structure in accordance with a prearranged scheme. Instead it has accepted the fundamentals of the existing adjustment built up by competition, modifying only such details as necessary to create a "reasonable" and "non-discriminatory" adjustment. This, after all, constitutes its important responsibility. The prophecy of those who opposed the granting of the rate making power was that the former policy would prevail; that there would follow an overturning of long established relationships with resultant uncertainty in business. Happily, the prophets of calamity were wrong. Whoever has a responsibility is much more conservative than is he who has no responsibility. The Commission, since 1906, has recognized that changes in the existing

[1] Ex Parte 74, Increased Rates, 1920, 58 I. C. C. 220; Reduced Rates, 1922, 68 I. C. C. 676, 687.

rate structure must be made only after survey of the situation as a whole. The general character of the rate structure has been maintained. Changes have been made only to correct unreasonableness, or unjust discrimination, and only to the extent necessary to secure the end sought.

CHAPTER VI

THE PUBLISHED RATE

§ 1. A contract for railroad transportation differs from other contracts for the purchase and sale of service in that the terms of the contract must be generally known. There can be no convenient cloak of "business secrets" behind which to hide price discriminations, rebates, "free deals" or long extended credits.[1] With the passage of the Interstate Commerce Act in 1887, it became unlawful to charge either a greater or less compensation for the transportation of passengers or freight, or for services in connection therewith, than the rate contained in the published tariff filed with the Commission.[2] The purpose of this requirement is to provide a standard of charge binding alike on carrier

[1] Following exposure of discrimination arising from the extension of credit to favored shippers for unduly long periods, the amendment of 1920 provided that no railroad should deliver or relinquish possession at destination of any freight transported by it until all tariff rates and charges thereon had been paid, except under such rules and regulations as the Commission might from time to time prescribe to assure prompt payment of all such rates and charges and to prevent unjust discrimination. Regulations for Payments of Rates and Charges, 57 I. C. C. 591, 63 I. C. C. 375.

In 1914 it was disclosed that the O'Gara Coal Co. had owed approximately $25,000 to the Chicago, Indiana & Southern for freight charges accruing in 1907, the amount having been paid off in installments, together with some $17,000 owed the Lake Shore, the debt being finally paid off in the latter part of 1911. No interest was charged and no security had been required. Coal and Oil Investigation, 31 I. C. C. 193, 235; see also Hocking Valley R. R. Co. *v.* U. S., 210 Fed. 735.

[2] In P. C. C. & St. L. Ry. Co. *v.* Fink, 250 U. S. 577, it was even held that the consignee of an interstate shipment is liable to the carrier, under the equal rates requirement of the Interstate Commerce Act, for the difference between the freight charges erroneously specified in the way bill and paid by the consignee upon receipt of the goods, and the larger amount due under the applicable published rates, although the consignee, by virtue of his agreement with the consignor, did not become the owner of the goods until after delivery.

and shipper, and open to the inspection of all concerned. To the extent that the transportation charge enters into the analysis of business competitors, its importance can, therefore, be calculated in advance, and can be generally appraised. "Any shipper can, with his head and pencil, figure out from the tariff sheets just what the rate is both for himself and for his competitors."[1] Without requirement that rates be made public, and provision that they be subject to alteration only on proper notice, it would be practically impossible to prevent discrimination. The publication clauses of the Act are the business man's protection against favoritism to his competitors, just as the reasonableness clause, and the rule of rate making, are his protection against extortion. They recognize his interest in his competitor's freight rates.

Adherence to the published rate, and the obligation to collect and pay that rate, sometimes place a real hardship on the user of the railroad service. If he depends upon the railroad employee for a rate quotation as the basis of a bid, including price at point of delivery, and is quoted an incorrect rate, the error cannot be "protected." The loss, if loss ensues, must be absorbed. The recourse which the law provides is attack upon the reasonableness of the rate charged and a plea for reparation. It is a situation analogous to that in which ignorance of the law is no excuse. To admit error as ground for permitting departure from the legal rate would throw down the bars.[2] The published rate must be paid and collected.[3]

§ 2. For rates to be legal, then, they must be published and filed with the Commission.[4] And they must be published in tariffs which conform to the regulations prescribed by the Com-

[1] Chicago & Alton R. R. Co. *v.* U. S., 156 Fed. 558, 563.

[2] Taylor *v.* Director General, 61 I. C. C. 109. The Supreme Court has held that posting is not essential to make rates legally operative. It is required only as a means of affording special facilities to the public for ascertaining the rates actually in effect. T. & P. Ry. Co. *v.* Cisco Oil Mill, 204 U. S. 449; Kansas City Southern Ry. Co. *v.* Albers, 223 U. S. 573; I. C. R. R. Co. *v.* Henderson Elevator Co., 226 U. S. 441.

[3] An interesting case was carried to the Commission because of the refusal to accept certain shipments tendered for transportation after the close of business on the day before increased rates went into effect. The contention of the carrier that higher freight charges should be assessed was upheld by the Commission, Transcontinental Freight Co. *v.* Director General, 62 I. C. C. 127.

[4] Occasionally it develops that rates not on file with the Commission are being used in error as a basis of charging for portions of interstate journeys. See reference to the testimony of the Traffic Manager of the Alabama, Ten-

mission. The tariff publications are standardized in size and arrangement, and ample in their statements of service and charges. The amending act of 1889 first empowered the Commission to fix the form of tariffs, but uniform or general instructions were not enforced until 1894. These have, from time to time, been modified. Until these rules were adopted, the multiplicity of tariffs, the possible ambiguity of their language, and their faulty construction often combined to defeat the purpose of the act. It was seldom easy—especially for the man not technically trained—to determine just what constituted the rate lawfully in effect. It is sometimes difficult enough even now. And, furthermore, in the event of contradiction or ambiguity, it was not always possible to establish responsibility for the publication of rates involving participation by more than one carrier. The originating carrier might have published the tariff, without indicating the participating carriers, and without proof of their concurrence. The latter, therefore, avoided liability, if charged with violating the Act, by denial of the existence of the rate, or consent to its publication. It was necessary to establish rules of general application in order to fix the responsibility on the carriers.

The tariff publication rules of the Commission, which, to the layman, might, at first, seem to go into needless detail, therefore have a dual purpose. They fix the basis of responsibility for publication and concurrence, an essential element in control over rates and charges; and they aim to create rate schedules which are clear, brief, and complete—free from ambiguity. If the rules go into infinite detail, it is because the railroad business is a business of infinite detail, and it is better for the untrained user of the railroad tariff to consult uniform schedules rather than a confusing variety of miscellaneous issues. The preparation and enforcement of detailed rules has furthermore served another and allied purpose. Whenever rules are worth making in the first place, every reasonable step must be taken to insure compliance with the rules. Economy in checking demands uniformity in compilation. It is required in every well managed private business; it is an essential part of the machinery of regulation. Prompt

nessee & Northern, and the Commission's comment: "Such a practice was, and if persisted in, is illegal, because contrary to the applicable tariff on file with us." Meridian Traffic Bureau *v.* Southern Ry. Co., 60 I. C. C. 5, 8.

rejection of issues failing to conform to the requirements of the rules soon taught the railroad tariff departments to check their tariffs when in the proof stage rather than to scrap an entire issue because of errors in compilation.

The requirement of the law has been definite from the first. But it would be absurd to assert that the lawfully published rate was regularly collected prior to the passage of the Elkins Act in 1903. The Elkins Act first made the carrier corporation criminally responsible as well as its officers, and made the shippers who received rebates criminally liable for so doing. It became sufficient, moreover, in order to prove a case of criminal wrongdoing, to show that a lower or different rate from that named in the tariff had been accorded. No longer was it necessary to prove not only that a secret and preferential rate had been paid by one shipper, but that another shipper had not received such treatment. The added strength of the law was made more effective by the increase of business which taxed the facilities of the railroads, and created a situation in which there was little temptation to secure business by price cutting. Undoubtedly rates would have been better maintained even if secret rates had not been prohibited.

§ 3. But though the letter of the law has been generally enforced since 1903, its spirit has not infrequently been violated. The grant of passes to shippers, their employees, or families is a variety of the "free deal" which is none the less real because the pass is not a part of a single transportation contract involving the shipment of goods. If business men travel on "stock men's" return trip passes, and political influence or personal friendship serves to secure passenger transportation, the rebate exists even when the passes issued are used only for intrastate journeys.[1]

[1] See the discussions of the use of intrastate passes to influence the routing of freight in Colorado, 26 I. C. C. 491. Passes were also issued to public officials, judges, legislators, and local and state executive officers. The Commission referred to the "cupidity of large shippers" and the "weakness of railroad officials." Fear of one another on the part of railroads was also remarked:

> "The pass situation in Colorado was 'wide open'; one road not knowing what its competitors were doing, and in order to avoid the mistake of denying a pass to a shipper holding the pass of a competitor, would issue a pass practically upon request of anyone having a substantial traffic to move. In Utah . . . they created the Utah Pass Committee . . . to determine the pass policy for . . . 1913; apparently the agreement reached was that no passes were to be issued at all. But within a week

To check the pass evil, the Interstate Commerce Act was amended in 1906 to limit the issuance of free transportation to railroad employees and their families, to persons in allied services, such as express, sleeping car, and railway mail service, or to persons engaged in charitable work. In the face of the prohibition the Annual Report of the Commission lists, each year, a number of prosecutions for the illegal use of passes. Other devices for cutting rates, or failing to collect the full charge for services rendered, have included lease of property at less than a fair or commercial rental, payment of a bonus for locating a plant, or a commission for the routing of freight by a forwarding agency acting as "import freight agent," failure to collect demurrage, transit, or elevation charge, or the making of allowances for drayage or for commercial, distinguished from "transportation," elevation.[1] False claims have been paid both for alleged overcharge, and for alleged loss and damage.[2] The "out and out" rebate has

after the conference, some of the Utah lines, yielding to pressure, returned to the practice . . . the Committee itself went to pieces and the pass situation in Utah thereupon also became 'wide open.'" Colorado Free Pass Investigation, 26 I. C. C. 491, 503.

Subsequently indictments were returned against two carriers and several of the larger Colorado industries, and fines aggregating $7,000 were assessed: 27th Annual Report I. C. C. (1913), p. 7. Conditions in Montana and Illinois were commented upon in a subsequent opinion: Montana Pass Situation, 29 I. C. C. 411. An investigation in Texas disclosed that railroads controlling subsidiaries elected large shippers as dummy directors in order that free passes, good within the state of Texas, might be issued with a color of legality. The practice had grown up and was continued as a result of competitive conditions. At least one railroad pleaded guilty and was fined: 29th Annual Report I. C. C. (1915), p. 20.

[1] 26th Annual Report I. C. C. (1912), p. 6; 27th Annual Report I. C. C. (1913), pp. 3-23; 28th Annual Report I. C. C. (1914), pp. 6-18; the vigilance of the Commission's Bureau of Inquiry, the success of prosecutions in the years 1912–1915, and the war period account for the marked falling off in prosecutions; 34th Annual Report I. C. C. (1920), p. 54; 35th Annual Report I. C. C. (1921), p. 65. The instances cited in the 1921 Report, or discussed at length, deal almost entirely with the illegal use of passes.

The elevation situation was cleared up only after the Supreme Court had ruled on the problem: I. C. C. *v.* Diffenbaugh, 222 U. S. 42. This case and its antecedents are discussed at length, 25th Annual Report I. C. C. (1911), pp. 48-53; the Commission's opinions are: Allowances to Elevators by the Union Pacific R. R. Co., 10 I. C. C. 309; 12 I. C. C. 85; 13 I. C. C. 498; 14 I. C. C. 315.

[2] Investigation of the claim situation in 1914 and 1915 showed that in the fifteen months, Jan. 1, 1914, to March 31, 1915, a total of 3,804,223 claims were paid (2,800,399 loss and damage claims, 1,003,824 overcharge claims), 505,406 were declined, and 79,469 withdrawn. During the calendar year, 1914, 4,563,438 claims were presented to the carriers, and on March 31, 1915, 96 per cent of these had been adjusted. In such a volume of transactions,

been the exceptional affair. It is easy to go through the motions of obeying the law; and extremely hard to go behind the records to the essence of the transaction.

§ 4. False billing of freight is an especially insidious practice. It is as old as the records of combined railroad effort—a practice especially difficult to police, because it is almost impossible to draw the line between "error" and connivance. The good faith of the shipper is largely depended upon; always for a description of the goods; sometimes for the weight of the shipment. If the shipper reports cutlery as hardware, or gasoline as unrefined naphtha, or paper boxes as strawboard, and thereby gets a lower rate than his honest competitors, the economic situation is exactly as though a cash rebate was paid.[1] If railroad employees connive at the dishonesty, the responsibility rests with both parties. Accurate weighing is equally important: to substitute the minimum weight for an actual weight in excess of that minimum, or to use an estimated weight less than the actual weight, or to "underweigh" shipments, results in a departure from the lawfully

the opportunities for fraud or connivance are, of course, many. Practices exposed in the New York egg trade included bribery of carrier agents to omit proper inspection of shipments. 27th Annual Report (1913), p. 4. The filing of false claims by so-called "Traffic Bureaus" is discussed in the 1916 Annual Report, p. 28. Resort to the filing of false claims as a device for rebating is certainly as old as the Interstate Commerce Act. Gen. E. P. Alexander, the President of the Central of Georgia, wrote in 1889: "I have known a case, for example, where a receipt was given for 75 barrels of whiskey when only 73 were shipped. The shipper was to make claim for two barrels lost and be paid an agreed value as a rebate on his freight bill." *The American Railway*, by Gen. Alexander and others, p. 174.

[1] While illegal payments have to a large degree been eliminated, it is doubtless true that the large shippers located at railroad junctions are able, by threatening to divert tonnage, to secure more prompt payment of their claims than smaller competitors, or competitors dependent for service on a single railroad. This is a kind of favoritism almost impossible to prevent: an inevitable concomitant of any system of competition in railroad service. This does not mean that the competitive interest of the carriers is utilized to force payment of unjustifiable claims. The days of sandbagging of that character are pretty much over; the claim department is no longer a mere rebate paying institution. The Interstate Commerce Commission's Examiners do not hesitate to look behind the ostensible transactions and to check in detail suspicious payments. Fraud, however, is much more likely to arise in connection with loss and damage claims, and is, on this account, the harder to ferret out. But the task is not impossible of accomplishment, as successful prosecutions at the instance of the Commission testify. Elgin, Joliet & Eastern Ry. Co. *v.* U. S., 253 Fed. 907; U. S. *v.* Union Mfg. Co., 240 U. S. 605; and instances cited in 30th Annual Report I. C. C. (1916), p. 26; 31st Annual Report I. C. C. (1917), p. 18. An especially interesting case is New York Central R. R. Co. *v.* Goldberg, 250 U. S. 85.

published rate. Such practices may, however, in part at least, persist without the knowledge of the carrier employees. The use of fictitious points of origin or destination, on the other hand, can only be the result of connivance. Indeed, the carriers have frequently been the beneficiaries of the practice. As large purchasers of coal, lumber, and other materials, they secured lower freight rates than industrial users or dealers, through the device of billing the freight to a fictitious destination, and stopping the shipment en route. The scheme was, of course, only useful when the freight originated on a connecting line with which the "divisions" accruing to each carrier depended upon the mileage haul of each. It was most effective when the same rate applied to a considerable group of points on the receiving line, while the amount of the division of the through rate increased with distance hauled. Such practices not only gave a rate advantage to the railroad user of coal over other receivers of coal in the same town —a discrimination based upon the use of the commodity, a circumstance quite divorced from the service of transportation[1]— but placed, in the hands of the railroad manager, the power to determine which mines should operate, and upon what terms.[2]

§ 5. Another method of "beating" the published rate has been the use of unauthorized combination rates. When a through rate is published, it automatically supersedes all previous combination rates; and, therefore, to apply a combination of local rates when a through rate is in existence means departure from

[1] The Commission has denied the carriers the right to discriminate in rates on the same commodity between the same points of origin and destination—the discriminatory rates being published, and the justification alleged being that the uses to which the shipments were to be put were not competitive. The railroads, on a principle of reciprocity, charged lower rates on railroad fuel coal than on the same coal for industrial or domestic use. For such roads as the New England lines, dependent entirely on the outside for fuel, this was an important item. In Capital City Gas Co. *v.* Central Vermont Ry., 11 I. C. C. 104, the Commission held that the uses to which a commodity was to be put did not justify discriminatory rates. This ruling was subsequently upheld in Ft. Smith Traffic Bureau *v.* St. L. & S. F. Ry. Co., 13 I. C. C. 651; and, after an extended investigation, in re Restricted Rates, 20 I. C. C. 426. The Supreme Court upheld the Commission's contention in the latter case: U. S. *v.* B. & O. R. R. Co., 225 U. S. 326.

[2] In 1914, a series of prosecutions resulted in the assessment of substantial fines. See 28th Annual Report I. C. C. (1914), p. 12. The Supreme Court opinion in I. C. C. *v.* B. & O. R. R. Co., 225 U. S. 326, contains a statement of the problem. See also the Commission's Report: Ex parte 52, in re Filing of Divisions of Joint Rates, Railway Fuel Coal, 37 I. C. C. 265; 38 I. C. C. 169.

the published rate. If the combination "makes" lower than the through rate, the remedy of the shipper is to pay the charge lawfully assessed, and to complain of its unreasonableness.[1] The device whereby the lower combination has been made to appear the basis of rates lawfully applicable has been the stopping of the shipment at an intermediate point, and rebilling from there. In this way the records have been made to show two distinct contracts of shipment. Usually the temptation to violate the law has arisen because state-made rates have been upon a lower basis than those applicable on interstate shipments.[2] It has been cheaper to interrupt the movement close to the state border, and to pay a combination of the low intrastate rate and the interstate rate for the portion of the journey rather than the through rate lawfully due.[3] Such practice is illegal, though difficult to police when connived at by the carrier. The principle of the law

[1] It is a long standing rule of the Commission, carried into the Act by prohibiting such rates without permission of the Commission (Sec. 4), that through rates in excess of the combination of locals are unreasonable. Typical cases in which such permission has been denied are: Through Rates from the Buffalo-Pittsburgh Territory, 36 I. C. C. 325; Through Rates to Louisiana and Texas, 38 I. C. C. 153.

[2] The practice of passengers paying intrastate fares to stations at or near state lines, clearly reflected by the sudden increase of "intrastate" business following the establishment of two cent fares in the Middle West, was an issue in the Minnesota Rate Cases, 230 U. S. 352; compare Business Men's League of St. Louis *v.* A. T. & S. F. Ry. Co., 41 I. C. C. 13, 503; Wisconsin Passenger Fares, 59 I. C. C. 391, 394, 395. The Wisconsin Intrastate rates in 1920 remained on a three cent per mile basis, while in accordance with the Interstate Commerce Commission's order in Increased Rates, 1920, interstate rates were advanced to 3.6 cents, effective Aug. 26, 1920. Immediately the business at Wisconsin border points increased, at Michigan or Minnesota points opposite fell; increased at Superior, Marinette, and Hurley, decreased at Duluth, Menominee, and Ironwood. Passengers saved 0.6 of a cent per mile, the Pullman surcharge, and the 20 per cent increase in excess baggage charges.

[3] The clear statement of principle appears in the Commission's opinion in the "Kanotex" Case: Kanotex Refining Co. *v.* A. T. & S. F. Ry. Co., 34 I. C. C. 271. In this case it was developed that the complainant with a refinery at Caney, Kansas, billed petroleum products destined to Woodward, Okla., to Kiowa, a Kansas point on the Santa Fé intermediate to Woodward, in order to take advantage of low intrastate rate. The cars were billed to an "agent" at Kiowa whose sole function was to act as consignee, and to rebill the shipments from Kiowa to Woodward. Sometimes the cars were actually handled through in the same train. The railroad, upon learning of the plan, refused to rebill shipments at Kiowa except at the balance of the through Caney-Woodward rate, and presented bills for undercharges. The latter the complainant refused to pay, and, before the Commission, alleged its right to interrupt the movement in order to "beat" the through rate. The latter contention, which Commissioner Harlan called "the question of greatest moment" involved in the case, was overruled: "This Com-

is clear: if a shipment has been turned over to a common carrier en route to a destination in another state, the shipment is in interstate commerce, and the state-made rates cannot apply to any part of the journey, unless this combination of rates is the lawful basis of calculating charges, and the intrastate rates are on file with the Commission. Not the billing, but the essential character of the shipment must determine whether interstate or intrastate rates apply.[1]

§ 6. Some allowances the carriers may make, but only in accordance with published rules, and upon equal terms to all. These allowances are for services which the carrier is obligated to perform, but which, in the interest of economical performance of the transportation service, the shipper may perform. The carrier must furnish cars in condition for use;[2] it must, when needed, furnish refrigeration and icing stations for perishable goods, and its contract of shipment on carload movements is not completely performed until it has effected delivery at private sidings along the right of way. Whenever the shipper performs work in the preparation of cars for use, or furnishes such auxiliary equipment as grain doors, the railroad may pay allowances at cost, provided the rules governing the payments have been published in

mission . . . has steadfastly adhered to the proposition that on any through carriage of traffic between interstate points, the lawfully published interstate rate must be applied by the carrier and paid by the shipper, and that where the through interstate rate in effect between two points is higher than the aggregate of the intermediate rates, any plan of first billing to an intermediate point a shipment that is really intended to reach a destination beyond is simply a device for defeating the lawful through rate, and is unlawful. . . . The defendant, therefore, was entirely within its rights, and, indeed, exercised a plain duty under the law, and to the integrity of its rate structure when it refused to continue to rebill from Kiowa. . . . It was also its duty to demand . . . payment . . . of undercharges." The principles thus enunciated have been sustained and applied by the United States Supreme Court: Baltimore & Ohio S. W. R R. Co. *v.* Settle, decided November 13, 1922.

[1] This principle has been clearly stated by the Supreme Court in passing on disputed rates when there was in effect an intrastate rate and a rate, filed with the Commission, applicable on business for export. The principle is the doctrine of Coe *v.* Errol, 116 U. S. 517, where it was said that goods are in interstate commerce when they have "actually started in the course of transportation to another state or delivered to a carrier for transportation." The later cases are: S. P. Terminal Co. *v.* I. C. C., 219 U. S. 498; T. & N. O. R. R. Co. *v.* Sabine Tram Co., 227 U. S. 111; R. R. Com. of La. *v.* T. & P. Ry. Co., 229 U. S. 336. The substance of the principle was applied in Ohio R. R. Com. *v.* Worthington, 225 U. S. 101, where it was held that the state of Ohio might not fix rates on lake-cargo coal.

[2] Balfour, Guthrie & Co. *v.* O. W. R. & N. Co., 21 I. C. C. 539.

tariffs on file with the Commission.[1] In the transportation of perishable products, refrigeration equipment is necessary, and, although the carriers own a considerable number of refrigerator cars, additional equipment is frequently needed to take care of movements during the peak of a season. For the efficient operation of their own plants, the meat packers find it necessary to provide refrigeration equipment, the movement of which they can control, and these packer cars furnish a flexible element in the refrigerator car supply. But since the packers are also large users of railroad service, the payments of allowances for the use of the cars may not be made the means for the payment of disguised rebates. Adherence to a cost principle is essential. The same principle governs payments for mileage of other classes of specialized rolling stock: tank cars, coal cars, heater cars, etc., privately owned, and payments for any service performed by the shipper for the railroad. Any other rule would mean promiscuous and uncontrollable departures from the published rates.[2]

[1] In Southwestern Missouri Miller's Club *v.* St. L. & S. F. R. R. Co., 26 I. C. C. 245, 250, it was held that the obligation to furnish cars in condition for use did not extend to lining and padding cars in preparation for flour shipments. "The primary object of lining cars seems to be to prevent the white sack from becoming soiled and to afford protection to the delicate texture of the package itself. The furnishing of this protection, which complainants claim to be necessary in the shipment of flour in sacks, partakes of the nature of private packing rather than of public equipment." In Rutherford-Brede Co. *v.* Director General, 61 I. C. C. 515, a failure to equip refrigerator cars with temporary false floors for transportation of potatoes under the carrier's protective service against freezing, and a refusal to pay the shipper for the cost of supplying was held not in violation of the Act.

During the epidemic of hoof and mouth disease, the United States Department of Agriculture required the carriers to clean and disinfect cars containing live stock carried in interstate commerce. The carriers arranged to perform the service in conformity with the standards of the Department of Agriculture by publishing a provision in their tariffs, assessing the charge for service against the shipper. Their right to make such a charge was upheld by the Commission. The Commission asserted the right, however, to regulate the reasonableness of the charge in the light of the cost of service. New Orleans Live Stock Exchange *v.* L. & N. R. R. Co., 31 I. C. C. 609; Hammond, Standish & Co. *v.* M. C. R. R. Co., 42 I. C. C. 102; South Omaha Live Stock Exchange *v.* C. G. W. R. R. Co., 43 I. C. C. 755.

[2] In the Private Car Case, 50 I. C. C. 652, the Commission indicated general principles to be observed in the use of private cars, and the methods of payment for their use. It was held that a charge in addition to freight rates should not be made for furnishing to shippers refrigerator, tank, or other special type of car, or for transporting their shipments therein, unless the freight rates are predicated on the transportation in another type of car, less expensive and not so difficult to operate. It was further held that payments by carriers for the use of private cars should be upon the basis of the loaded and empty mileage, the mileage to be computed on the basis

§ 7. Divisions of joint rates or absorption of switching charges paid to railroads owned by shippers for the switching of cars in and out of the plant of the owners must also be established on a basis of cost. An "industrial railroad" may earn a fair return upon its value, but no more. For any excess would accrue to the industry as a net departure from the rates. Obviously, therefore, it has not been possible to apply the usual doctrine governing the division of through rates, that the division of the rates is a proper subject of bargaining between the participating carriers. There must be supervision of the allowances made, and they may be no more than is reasonable for the work done. A switching service should be paid for as such, and not as a line haul through a division of a through rate. The usual basis is a flat per car payment. In some cases, there are, of course, legitimate grounds for doubt whether any allowance at all is due or may be paid. The line between a plant service and a transportation service, or the line between the railroad which is a mere plant facility, and that which is a *bona fide* common carrier, is not always easily drawn.[1] Especially is this true in

of distance tables without the elimination of mileage through switching districts. The allowance of three-fourths of a cent on the loaded and empty movements for the use of tank cars of all kinds by carriers was increased to one cent a mile for the loaded and empty movements; the allowance to be paid for the use of live poultry, palace stock, and heater cars was increased; though the increase was not applied to stock, coke, coal, rack, flat, box, or pocket cars, although privately owned. The rulings on re-icing were as follows:

> "Re-icing charges on shipments of fresh meat, packing-house products, and dairy products should be based on the cost of the ice and salt used, the labor, investment in icing plants, etc., together with a reasonable profit; carriers should perform the service of re-icing and make the charges therefor; and shippers of these products should not be permitted to perform the service of re-icing their own and competitors' shipments en route, either directly or through corporations controlled by them."

[1] In 1904, the Commission's investigation disclosed that the carriers at Hutchinson, Kan., had been paying the "Hutchinson & Arkanses River Railroad" 25 per cent of the through rate to the Missouri River (but not to exceed 50 cents a ton) on bulk salt. The H. & A. R. R. R. owned less than a mile of track (formerly the necessary plant switch) connecting the Morton salt mill with two of the trunk lines; its stock was held in the names of officers and employees of the salt company. The passage of the Elkins Act in 1903 interrupted the practice for a time. The Commission held the division of the rate with this "so-called" railroad a "mere subterfuge," and therefore unlawful: Transportation of Salt from Hutchinson, 10 I. C. C. 1. The substitution of a division of the through rate (20 per cent) for a switching charge of $1 to $3 per car resulted, on some traffic movements, in payments of $12 per car to railroads controlled by the International Harvester Co. Switching charges were again prescribed. Re-Divisions of Joint Rates, 10 I. C. C. 385.

the iron and steel business where a plant railroad is essential for economical production operations. Each case must, therefore, be handled upon its own merits.

Essentially the same economic problem is presented by the lumber "tap lines." These are the spurs leading into the forests, connecting timber tracts, the sawmill, and the mainline railroad. Frequently they serve agricultural communities which have been colonized on cut-over lands, and are, in fact as well as in form, common carriers. The extent of the allowances or divisions which may be paid for the service of switching from mill to railroad has been provided in orders of the Commission. These allowances increase with distance, although for a mere switching service a per car payment is made.[1] At the time the Commission

These were but the forerunners of a series of cases involving payments to industrial railroads, culminating in the inclusive Industrial Railways Case of 1914, 29 I. C. C. 212, and the Second Industrial Railways Case, 34 I. C. C. 596, which grew out of the withdrawal by the trunk lines from joint arrangements with substantially all industrial railroads. A number of the latter filed complaint, and the Commission reopened this case, holding that it would thereafter look at the facts as presented by each industrial railroad. Typical recent cases are: Virginia Portland Ry. Co., 49 I. C. C. 332; Owasco River Ry., 53 I. C. C. 104; U. S. Cast Iron Pipe Co. *v.* Director General, 59 I. C. C. 59; Birmingham Southern R. R. Co. *v.* Director General, 61 I. C. C. 551; Divisions Received by Brimstone R. R. & Canal Co., 68 I. C. C. 375. There are two issues to be decided: (1) Shall any payment to the industrial railroad be made, and (2) if so, how much? In order that any payment may be made out of the line haul rate, either as a division of a joint rate or as an absorption of a switching charge, the industrial railroad must be a *bona fide* common carrier, performing public as contrasted with plant service. The rule of cost governs the amount of any payment. If the industrial railroad is not a common carrier, the owner may, in proper cases, be compensated by a published allowance for performing a service in connection with the transportation of his property. A strictly plant service would not, of course, be such a service in connection with the transportation of property as is contemplated by section 15 of the Interstate Commerce Act.

[1] The Tap Line Case, 31 I. C. C. 490. In 1919, investigation showed that the Prescott & Northwestern, an Arkansas tap line, was hauling lumber from its mill, located a mile from its junction with the Missouri Pacific at Prescott, to its junction with another tap line, the Memphis, Dallas & Gulf, which turned the lumber over to the Missouri Pacific at Nashville, Ark. All traffic north, east, or west was then hauled through Prescott by the Missouri Pacific involving an out of line haul of 76 miles, made in order to secure a division of the through rate. Another tap line, the Ouachita & Northwestern, paralleling the Missouri Pacific, and connecting two mills of the proprietary lumber company, 10 miles apart, with each other and with the Missouri Pacific at a point about a mile from each mill, hauled lumber from the southern mill, destined to move south over the Missouri Pacific, to the northern junction, instead of switching to the main line close to the mill. Northbound lumber originating at the northern mill was hauled south. The tap line would receive for this service 3 cents per 100 pounds, or about $18, instead of a $2.50 switching charge; the main

first investigated tap line divisions, it forbade their payment on the ground that in hauling lumber for the so-called proprietary companies the tap lines were not acting as common carriers. The Supreme Court, in the Tap Line Cases, held that the Commission had erred in taking this view of the law.[1] Subsequently, the Commission modified its opinion so as to conform to the decision of the Supreme Court.[2] In the old days the payments had been upon a basis which frequently represented 20-30 per cent of the through rate, although the service performed involved switching the cars but a short distance. The payments were disguised rebates. Now the payments are based upon distance as a measure of the service performed.

A fundamental question remains for consideration. Why should the railroads, when protected by the law in the collection

line revenue was shrunk $15.50 per car, and the railroad performed an additional and unnecessary haul. The Prescott & Northwestern allowance would be $21 per car instead of a switching charge of $2.50. The Commission held that the divisions must be measured by the distance over the direct routes from the mills to the trunk line junctions. Wasteful Service by Tap Lines, 53 I. C. C. 656.

Similarly wasteful service was disclosed in an examination of the affairs of the Oakdale & Gulf. It was shown that from May 17, 1916, to Dec. 31, 1918, this tap line delivered 13,716 loaded cars to the trunk lines, of which nearly half had been hauled out of line, approximately 16 miles. As a result of these 32 months of operations, net earnings of $25,991.07 were shown on an average investment of approximately $12,000. Oakdale & Gulf Ry. Co., 58 I. C. C. 450.

[1] The Tap Line Cases, 234 U. S. 1, overruling the Commission's opinion in the Tap Line Case, 23 I. C. C. 277, 549, 591–594.

[2] The Commission's opinion vacating its original orders and fixing divisions and switching allowances is the Tap Line Case, 31 I. C. C. 490. The amounts of these divisions and allowances were, subsequently, changed, from time to time, although the governing principle was not changed. It was, indeed, when challenged, upheld by the Supreme Court: O'Keefe *v.* U. S., 240 U. S. 294. This case was brought in the interest of the New Orleans, Texas & Mexico which sought to pay the same allowances to a tap line, the Louisiana & Pacific, as was paid by competitors who interchanged with the tap line at its terminals. The N. O. T. & M. struck across the middle, and the tap line, which had formerly received a competitive division (35 per cent!) from all roads, usually preferred to make delivery to that trunk line which could pay the largest division. The N. O. T. & M., seeking to reclaim the tonnage lost to its rivals, sought an injunction against the Commission's mileage order, in order that it might pay the tap line a sufficient amount to prevent diversion to its competitors, the Santa Fé, Kansas City Southern and Missouri Pacific. Approximately 98 per cent of the tap line tonnage was furnished by lumber mills owned or controlled by the interests owning the tap line, the R. A. Long interests of Kansas City. The tonnage turned over to the N. O. T. & M. had amounted to approximately 13 per cent of its total gross tonnage. The Commission's order was upheld.

of the published rates, ever connive at its violation? No one can believe that a railroad manager would thus dissipate the earnings of his company without impelling pressure. What has furnished the motive for discriminating? Obviously, the desire is to get business. Rate cutting by rebating or paying "allowances" is price cutting, and rates are cut for the same reason that any prices are cut—to secure business which, it is thought, otherwise would be lost to a competitor. A system of rebating can only be profitable to a railroad when its competitors are maintaining rates. If all are rebating, all lose. That the enterprises most successful in securing rebates whether out and out money payments, such as were typical prior to 1903, or "allowances" of one sort or another, have been large scale operations, has simply meant that they possessed more traffic with which to club the carriers. The latter were helpless. They could not fight back. The reasons for their helplessness will be apparent from an analysis of the economic peculiarities of the railroad business.

CHAPTER VII

THE ECONOMICS OF RATE MAKING

§ 1. Two principles governing rate making in the United States have thus far been demonstrated: (1) rates must be reasonable that the user of the railroad may be protected against extortion; (2) rates must be published in order that he may be protected against secret discrimination. Between these principles an important difference exists. The requirement that there must be a definite and known charge for each service is a concrete matter, capable of demonstration by inspection. The words, "just and reasonable," on the other hand, are not "fixed, unalterable, mathematical terms." They are, on the contrary, indefinite and uncertain.

Congress has stated no rule of reasonableness as reasonableness may apply to a particular class of traffic, though, by the rule of rate making, it has sought to specify a test for the general level of rates. The individual business man, however, is primarily concerned with the rates on a relatively limited number of commodities—the rate on prunes, pick-axes, umbrellas, etc. Most business enterprises specialize. Only in a general way are they directly concerned with the return to the railroad, with which the public has concerned itself in the aim to prevent an unreasonably high level of rates. The problem of reasonableness is, therefore, disclosed as a two-fold problem. Rates reasonable in themselves should net a fair return on the value of the railroad property. Clearly this is the theory of the law, however vague, however uncertainly expressed.

§ 2. The requirement that rates shall be reasonable is then rather a statement of a problem than the statement of the solution of that problem. Preliminary to a clear analysis of governing principles of "reasonableness," therefore, the economic origins of the problem must be traced. These, like the origins of the problem of discrimination, which gave rise to the requirement that rates be published, are found in the economic peculiarities of the railroad business. These economic peculiarities are two: (1) a very considerable portion of the current cost of railroad operations is incurred jointly for freight and passenger business, and, (2) a very considerable portion of the costs remain constant in the face of changes in the volume of traffic, whether increasing or decreasing.

The large investment in fixed plant must be the starting point. The aggregate "book cost" of road and equipment, as reported by the railroads to the Commission, is in excess of $20,000,-000,000. In the 1920 Increased Rate Case, a tentative "value" for the same properties was fixed at $18,900,000,000, and these same figures were used as a starting place for the calculations in the 1922 Reduced Rate Case. The railroad plant represented by these figures is highly specialized; many elements of its cost can be recovered only through use in the transportation service. When a railroad is dismantled, the money spent in the construction of the permanent way is lost, the rails and track fastenings of the roadbed generally being the only portions worth the cost of salvage. The original investment in the abandoned line of the Colorado Midland, or of the Buffalo & Susquehanna, or, for that matter, of the uncompleted Providence extension of the Grand Trunk, illustrates losses of this character. Abandoned grades everywhere represent similar economic wearing out, even when the abandonment has been the result of relocation to eliminate gradient or curvature. The only alternative use is as a public highway, a use to which portions of the Colorado Midland, and of the old line of the Lackawanna, have been devoted—to cite illustrations of grades abandoned for quite different reasons. In very large degree, the situation is exactly as though the money had been spent in drilling an oil well which had failed to strike oil, or in sinking a mine shaft without finding ore. A store building, a factory, or a warehouse, on the other hand, usually can

be transferred to another profitable use, unless its construction represented hopelessly bad business judgment.

§ 3. This large and specialized plant is used for more than one kind of service. The earnings from mail and express, in 1916, the last "pre-war" year, $61,227,765 and $90,311,885, respectively, are not relatively as important as earnings from passenger and freight business. Freight revenues for the same year were $2,574,740,215, passenger revenues, $707,757,469. Since mail and express are largely carried on passenger trains, it is readily apparent that practically none of the costs incurred in their transportation can be assigned definitely to mail or express service except on an arbitrary basis.[1] The reasoning which, therefore, will account for the peculiarities of the rates on freight and passenger traffic will apply in equal, if not greater degree, to these subsidiary services. For the essential economic problem is the same; a very considerable portion of the cost of transportation is incurred for operations as a whole, and not for one class of business or the other. This is the meaning of the statement frequently made that railroad operations are carried on under conditions of joint cost.

There are, of course, some direct charges which admit of ready allocation. Much of the traffic expense, the cost of solicitation, can be allocated because the freight and passenger traffic personnel is ordinarily distinct below the supervisory executive. The same is true as to much of the expense of maintaining equipment, since there is a considerable degree of specialization, even in motive power; true as to a large part of the expense of conducting transportation, since the actual road work is performed in one service or another. But general expense, the salaries of executives, of legal advisors, and frequently of financial and accounting staffs, and the costs of maintenance of way are largely

[1] An Act of July 28, 1916 placed with the Interstate Commerce Commission the power to fix and determine, from time to time, the fair and reasonable rates and compensation for the transportation of mail. The opinion of the Commission reporting its findings, Railway Mail Pay, 56 I. C. C. 1, contains a history and description of the methods of payment, a discussion of methods of calculating "cost of service," and a requirement that the "space basis" of payment be extended to all mail routes. Higher rates were prescribed for "short lines."

Express rates likewise have been fixed by the Commission: Express Rates, 1920, 58 I. C. C. 281, 707. These cases were concerned with the general level of express rates, and approved advances in rates.

incurred for the service as a whole. The track must be made safe for both passenger and freight business or the entire service will be demoralized. Even though the extent of the use of the roadbed in the one service or the other may be important in determining the standard of maintenance, that standard once established, the costs are not susceptible of direct allocation. The maintenance of work equipment, and of locomotives where used in both classes of service, or in mixed train service, are also joint costs. The costs of despatching, of maintaining station forces, except in large terminals, of operating signal equipment and interlocking plants, of superintendence in operation—these, too, are incurred for the service as a whole. Any assignment of such joint costs must be made upon an arbitrary basis, in terms of statistical units.[1]

The bearing of this analysis of railroad costs as direct and joint may now be indicated in relation to the problem of railroad rate regulation. Since railroad operations are carried on under conditions of joint cost, no regulatory body can use cost of service as the basis of determining the reasonableness of an individual rate. Cost is simply not ascertainable. This is true whenever there is a variety of goods produced in a large plant. Cost accounting is, always and at best, merely approximation. Its possibilities are distinctly limited in railroad operations, especially when it is proposed to go beyond mere allocations to the principal service. For, while the passenger branch performs practically a homogeneous service, the freight branch does not: the same locomotive is usually pulling a train containing a widely

[1] Had the railroads in 1921 earned the income to which the Commission held they were entitled, the total expense, including the return on the value of the property, would have been something very like the following:

	Largely Joint	Both	Largely Assignable
General Expense	$170,000,000		
Traffic Expense			$85,000,000
Maintenance of Way	800,000,000		
Maintenance of Equipment..			$1,250,000,000
Transportation		$2,300,000,000	
Return on Investment	1,150,000,000		
	$2,120,000,000	$2,300,000,000	$1,335,000,000

All things considered, it may be concluded that certainly 50 per cent, and probably about 60–70 per cent, of the total cost of furnishing transportation is incurred jointly for the two principal classes of traffic, and must be arbitrarily assigned.

varying traffic. The movement of full trains of silk, automobiles, or agricultural machinery, lumber, coal, or ore, is, on most railroads, an event of such rare happening as to call forth newspaper comment. To be sure, such specialized roads as the ore lines of the Duluth regions, the lumber tap lines, the coal carriers, or those closely allied with an industry, of which the Bessemer & Lake Erie is perhaps the most conspicuous, frequently carry full train loads of a single commodity. But also on occasion, they carry a mixed traffic such as is typical of the usual freight train: dry goods, machinery, hardware, foodstuffs, fuel, building material—an endless variety. The car containing less than carload freight carries small shipments of an even more varied traffic, entirely at joint cost. To determine the cost of the movement of 100 pounds of flour, of automobile tires, or nails is out of the question. Cost cannot therefore be established as the basis of rates, even if there were not other reasons for not using it. The usual measure of a fair price, cost plus a profit, cannot be a tool of the Interstate Commerce Commission considering the reasonableness of individual rates.[1]

§ 4. Attention may now turn to the analysis of railroad costs based upon their character as "constant" costs and "variable" costs.

This classification is not the same as a classification based on direct and joint costs, however much it may have been confused with such a classification. Before any business can be done, the permanent way and structure must be built, a necessary equipment provided, and personnel hired. Current interest charges and wages constitute an irreducible minimum cost if the railroad is to operate. So, in the beginning, when the volume of traffic is small, increased business can be accepted without swelling the costs of doing business in significant degree. Ultimately, added traffic may make necessary the purchase of new cars or locomotives; it may lead to hiring new station clerks and freight

[1] The principle that cost plus a profit cannot be a measure of a fair or reasonable price when production is carried on under conditions of joint cost is illustrated by experience of government price fixing agencies during the war. The Food Administration found it necessary to limit the profits of meat packers because of the variety of by-products, while for commodities produced in homogeneous units, the usual policy was to prescribe fixed margins of profit over cost. *Government Control over Prices*, P. W. Garrett, published by the War Trade Board, pp. 95–99 and *passim.*

handlers; it may make necessary the installation of new passing tracks; and finally it may force double tracking. But competent authorities have estimated that about 55 per cent of railroad expenses go on uniformly, regardless of the volume of business done.[1] It is not difficult to trace why the railroads have felt keenly the effects of business depression. And, on the other hand, on a rising tide of prosperity, a more intensive use of the roadbed can be made without adding to interest charges. That portion of maintenance charges due to weather and not to wear and tear will not be affected by increased business; general expense may be increased by hiring assistants, but the executives' salaries remain the same; even the cost of conducting transportation will not swell proportionately with an increase in business. So long as there is any "unused capacity," a considerable portion of the railroad costs remain constant, or nearly so.

The qualification that there must be, somewhere, unused capacity which newly created business can utilize, is especially important to the shipper who comes to the railroad seeking a lower rate. If there is unused capacity, the argument that the rate concession, through creating a larger volume of business, presumably promises, in the face of lower contributions per unit of traffic, a larger total contribution to net earnings, is valid. If there is no unused capacity, increased traffic will mean increase not only in variable costs, but in the constant costs as well. An added train may so disarrange the operating program as to demoralize train service. There is, after all, a maximum limit to operating capacity. If increased traffic requires double tracking, the laying of heavier rail, or the rebuilding of bridges and tunnels in order that larger cars and locomotives may be used, a considerable and immediate expansion in "overhead" results.

[1] F. A. Delano, "Railway Problems and Railway Rates," *The World Today*, vol. 20, p. 161. This coincides substantially with Professor Ripley's estimate, *Railroads, Rates and Regulation*, p. 55. A detailed analysis of railroad expenses appears in Buell *v.* C. M. & St. P. Ry. Co., 1 Wis. R. C. R. 324; this report, like Professor Ripley's discussion, does not always distinguish clearly between joint costs and constant costs, between direct costs and variable costs. The most elaborate discussion is that of the present Statistician of the Commission, M. O. Lorenz, "Constant and Variable Railroad Expenditures and the Distance Tariffs," *Quarterly Journal of Economics*, vol. 21, p. 283.

W. M. Acworth, *Elements of Railway Economics*, p. 50, summarizes as follows: "On the whole a common and probably roughly accurate estimate is to say that half the total expense is fixed; half varies with the traffic."

The railroad manager may well hesitate to take on additional business when this prospect is found. The period from 1900 to 1915 saw just this situation in the United States, and railroads extended their plant investment on a large scale. There has not resulted a new condition of unused capacity, however, because, since 1915, traffic has increased so rapidly as to press upon the slowly expanding facilities of the carriers. For most roads, except during the depression months of 1921-22, there has seldom existed any motive to reach out for new traffic. In those months even the strongest railroads addressed their stockholders, urging the routing of freight over the line.

Let the railroad plant be increased, however, by installation of additional passing or main line tracks, or let it be disclosed, even under present congested conditions, that there is a considerable empty car movement, and a whole chain of cause and effect is again set in motion. Exactly how this operates is illustrated by the history of the lumber rate adjustment from the Pacific Northwest. In 1893 the Great Northern inaugurated a low rate on lumber from the Pacific Coast in order to create a volume of eastbound tonnage which would absorb its heavy eastbound empty car movement. The line had been but recently completed through and did not have tributary to it established enterprises as had the pioneer Northern Pacific. The cars were moving across the continent anyway; it would cost but little more to haul them full than empty. Whatever the traffic contributed above the "out of pocket expense," extra coal cost, extra clerical help in stations in billing and checking the freight, was clear gain. The result was the establishment of a low rate, profitable because the large volume of the railroad expense was constant, and only a small amount was added to the variable costs. The irony in the situation developed when the railroad was later called upon to haul empty cars westbound to accommodate the lumber traffic. The attempt to advance the rates, either to choke off some of the traffic, or to compel it to meet these new added costs was frustrated by the Interstate Commerce Commission, which held that the original lumber rates were "reasonable."[1]

§ 5. It has, then, been the desire to secure a full utilization

[1] Pacific Coast Lbr. Mfrs. Asso. *v.* N. P. Ry. Co., 14 I. C. C. 23, 33; I. C. C. *v.* U. P. R.R. Co., 222 U. S. 541.

of the plant which has led the railroads to seek out new sources of traffic which would make some contribution to their constant costs. Historically the movement can be traced: first, the carrying of passengers; then the carrying of valuable goods; and later an active effort to create business through charging lower rates for less valuable goods. "Missionary rates" were placed in effect.[1] In the United States, the great impetus to the latter policy came with the substitution of steel for iron after 1870. Improvements in track and cars increased the capacity for doing business, at the same time that they made possible cheaper costs of operation. Through the decade of the '80's and into the '90's, railroad building also went on, largely an extension of lines into the West, in advance of population and traffic. Business at almost any price was better than no business at all. Rates were established on the principle of "what the traffic would bear," and primarily on the basis of the value per 100 pounds. The relationship between commodities, or the "discriminations" thus worked out, are our inheritance today. Fundamentally, its justification is that it has led to the fullest utilization of the railroad plant.

There has been some hesitancy on the part of both railroad men and regulatory commissions to use the phrase "charging what the traffic will bear" as a canon of rate making. Instead, there has been coined the rather meaningless phrase of "value of service to the shipper."[2] In 1910 the Commission criticized rates made upon this basis, saying: "Rates being made upon this theory, the function of the traffic manager is that of a statesman;

[1] Fruits and Vegetables, 43 I. C. C. 291, 293, 319.

[2] Clearer reasoning on the subject of rate making would have resulted had both railroad men and the Commission looked the issue squarely in the face. The value of the transportation service has been defined as the difference in price of a commodity between point of origin and destination. (C. Colson, *Railway Rates and Traffic*, C. Travis translation, p. 13.) This suggests an objective standard, a suggestion quite deceptive, however, since the price difference itself depends on transportation costs. The differences in wheat prices at the various primary markets approximate the differences in freight rates. To base freight rates on the value of service, in this sense, is to argue in a circle. The word "value" has been used very loosely, because of an assumed contrast with "cost," and not upon any basis deduced from close reasoning. The statement of a cost principle, and a value principle, and then a compromise conclusion is hardly a statement of a theory of railroad rates. Instead it is the statement of a problem: "Our final conclusion must be this: that both principles are of equal importance, and that both must be continually invoked as a check upon the other . . . neither will stand the test of reasonableness alone. Whether the one or the other should take precedence

he determines zones of production and consumption, . . . he makes his rates, if he so pleases, to offset and nullify the effect of import duties and determine the extent and character of our foreign markets." [1] After the price declines of 1920 had led many shipping interests to demand rate reductions, the Commission recommended a reduction in rates on live stock and ordered a reduction in the rates on grain, grain products and hay.[2] There can be no doubt but that these decisions of the Commission were influenced by a belief on the part of the commissioners that the agricultural industry would be aided in its economic rehabilitation through a reduction in freight rates. The Commission justified the reductions ordered, even in the face of inadequate earnings of the carriers, upon the assumption that the carriers themselves would be benefited by an increase in agricultural prices. In other words, the Commission sought to accommodate rate levels to the needs of the traffic.

The maximum rate which the railroad, consulting solely its own interest, will establish on a particular kind and movement of traffic, is not the rate at which some traffic will barely move, but the rate at which the volume which will move will net the largest total contribution above out of pocket expenses. So long as this principle is applied to all the traffic, and so long as the railroad out of its operations as a whole, does not make an excessive profit, no claim of the exercise of monopoly powers, either by one carrier, or by a group of carriers, can be set up and justified. A railroad company owes a duty to its owners as well as to the public. This fact is too frequently lost sight of in discussions of the railroad problems.

The principle of charging what the traffic will bear is effective in two ways: (1) rates may not be so high as to *divert* traffic; (2) they may not be so high as to *destroy* "profitable" increments of traffic.

can only be determined by the circumstances and conditions in each case; and, in practice, the instances where either principle becomes of binding effect, to the entire exclusion of the other, are rare indeed." W. Z. Ripley, *Railroads: Rates and Regulation*, p. 184.

[1] Advances in Rates-Western Case, 20 I. C. C. 307, 350.

[2] National Live Stock Shippers' League *v.* A. T. & S. F. Ry. Co., 63 I. C. C. 107; Rates on Grain, Grain Products and Hay, 64 I. C. C. 85; Reduced Rates, 1922, 68 I. C. C. 676, especially the dissenting opinions of Commissioners Lewis and Cox, which opposed a horizontal reduction in rates, and favored reductions on "basic" commodities.

§ 6. The struggle to secure diversions of traffic by competitive carriers of the same class (railroads, rail and water lines, water lines) in the past has made itself felt, as a rate matter, in rate cutting. The rate wars were waged by cuts of competitive rates on which threats of diversion might be effective, while noncompetitive rates were maintained.[1] Rebating has been simply another phase of the same struggle. Since a very considerable portion of the costs of doing business do not expand with an increase in traffic, it is worth while to get business which pays anything above the added costs of moving that business. More traffic means that the overhead is spread thinner. If, by cutting rates, an individual railroad can get business which otherwise would move by a competitor, in addition to its own "share" of the competitive traffic, the transaction is profitable. The difficulty is that whatever one carrier does, its competitor must do, and will do. The news of rebates leaks out (doubtless the shippers frequently have assisted in the process), and the net result is that all pay the same rebates, that the volume of traffic which moves remains substantially the same, and that, in the long run, all of the carriers lose. A system of rebating or making "allowances" can be profitable to a railroad only when its competitors are not likewise resorting to the practice. The requirements of

[1] The day of this class of discriminations is gone. The Southern Rate War of 1894 was the last general demoralization and its results were so widespread and generally known as to draw the attention of the Commission. Rates were slashed to the principal competitive points from both the Ohio River Crossings and the East. Class rates from New York to Atlanta, which may be taken as typical, were cut almost two thirds:

Classes	*1*	*2*	*3*	*4*	*5*	*6*
Before June 2, 1894	114	98	86	73	60	49
After June 2, 1894	40	34	30	26	21	17

The old rates were restored after Aug. 1, 1894, but, in the meantime, dealers in the favored localities loaded up their warehouses with stocks of goods. Competing dealers at less favored points were denied this advantage, and their business necessarily suffered. Indeed, it was frankly stated at the investigation held by the Commission that a controlling reason for the continuance of the inordinately low rates for the two months was the fact that one of the principal carriers had agreed to keep the low rates in effect until August 1, in consideration for routing goods exclusively by its line. The merchants so situated as to take advantage of the reduced rates were able to compel their competitors located at less favorable points to refrain from competition, or else to reduce prices to a level impairing or destroying profits. This was particularly true of manufacturers or jobbers at the Ohio River Crossings and Northern Seaboard cities, who sold to small town dealers whose "in" rates were not affected at all, or were very slightly affected, by the reductions.

the Interstate Commerce Act and the Elkins Act have, however, outlawed the practice of departing from the published rate.

But the principle of charging what the traffic will bear, as regards its other implications, remains fundamental in current railroad practice. High fares may throw passenger service to automobiles or water lines. Likewise freight traffic may be diverted, on long hauls, to water lines, or rail and water lines, where available; on short hauls, to the motor truck. Where there is a volume of business regularly flowing, as in the transportation of crude petroleum, or of iron ore, the economies of pipe lines, and of tankers and ore boats have made possible rates lower than would be profitable for the railroad to accept. The largest volume of the business has been diverted. In any case, the rates set by these substitute agencies of transportation determine the maximum rates which the railroad can publish, if it is to participate in the business. That the public, through meeting highway costs, subsidizes private carriers of goods by motor truck has not yet received that emphasis and general recognition which its importance deserves. On short haul business, especially where there is a dense traffic, the motor truck, with the subsidy from taxation, can, it would seem, take the business from the railroads. Only on long haul business, where no alternative transportation service is available, can the railroad fix rates solely with the view of earning the maximum return possible from the business which can be created.

§ 7. When the possibility of diversion does not play a part, the way in which freight charges are paid and shifted from seller to buyer makes it practically impossible to determine in advance just what effect a given change in rate will have upon the volume of business. This is because for many commodities, the freight rate is but a small part of final selling price. For the heavy and bulky commodities, on the contrary, the amount that the traffic will bear may be significant as determining the movement of the traffic or its destruction. Especially is this important when there is an available alternate source of supply, or even a substitute use for the commodity. Corn had been burned for fuel before 1920-21. It is for the heavy and bulky commodities, more particularly, therefore, that rate adjustments must be made which keep everybody in business, and "move the tonnage."

In this sense, therefore, "market competition" presents a phase of charging what the traffic will bear without destruction. Similar goods must be laid down in the common market to be sold at the same price. If cost of production plus the freight rate is higher from one source of supply than from the other, the goods will not move to the common market from the points working at a disadvantage—if the favored source of supply can satisfy all the demand. Sporadic movements may occur to take care of a temporary surplus, but in general, the competitor operating at a disadvantage will find himself barred from the market. The traffic which his plant might furnish the carrier serving him cannot be moved. So far as that particular market is concerned, his traffic will not bear the charges. Railroad and customers lose business which might be created. In this juncture the shipper may appeal to the railroad manager, pointing out the disability and the possible volume of tonnage, which might move at a lower rate. Fundamentally he must make a showing in terms of his cost of production as compared with that of his rival, although Commissioner Lane once insisted that to fix rates "upon the cost of production, rather than upon the cost of carriage" . . . was "regulation of the industries and commerce of the country by its railroads." But as a practical matter there can be no other test. If costs of production are substantially the same, the equalization of the freight rate will meet the need; if costs are higher, a lower rate must be secured; if costs are lower, a higher rate may be paid, the differential meeting the competitive requirement.[1]

On passenger business, the burden of the cost of transportation is more directly felt. In 1920, it was decided that a part of the

[1] The following statement of Mr. Walker D. Hines before the Railroad Securities Commission, Dec. 22, 1910, illustrates the railroad practice: "You gentlemen are entirely familiar with the general principle of how rates are made. I think it can be illustrated very briefly by a situation which arose in western Kentucky a great many years ago, when coal mines were first opened on the Henderson Division of the Louisville & Nashville Railroad. At that time the only fuel in that country was wood. These coal mines were opened. The railroad company wanted to make rates to haul this coal, which was a new traffic. Strange to say, the railroad company did not select anybody who knew anything about its capitalization to do that. It selected a very wise man who was operating coal mines down in that country, and said: 'You find out what rates will move this traffic.' And this gentleman went to work to find out what wood cost in the various towns on the road, and what was the equivalent in coal of a given amount of wood. He figured out, from that, what consumers of fuel in those towns would be willing to pay in order to get the coal instead

revenue which the railroads needed was to be secured from a selected group of passengers, those using Pullman car service, presumably a class better able to pay. The principle of charging what the traffic would bear was applied through the device of a surcharge, carrying into the passenger rate structure a discrimination (though not an "unjust" discrimination) based, in largest measure, on ability to pay. The surcharge had been developed as a wartime emergency measure. Moreover, an advance in passenger rates of only 20 per cent as compared with 25-40 per cent advances in freight rates, was made, because, *inter alia*, of possible reduction in railroad travel following a material increase in fares. This would result not only from the fact that pleasure travel would fall off because of its greater cost, but because business houses would curtail the number of trips of their salesmen, and would avoid travel in thinly populated sections, such as the mountain states. To some extent, the existence of an alternate service would be important, the water carrier for pleasure travel, the motor car for short distance business use. Rates might not, in the interest of the protection of revenues, be raised above a level at which the traffic would be destroyed or diverted to an extent resulting in net loss. In 1922, when freight rates were decreased below the levels set in 1920, passenger fares were not disturbed.[1]

§ 8. The principle of charging what the traffic will bear, as qualified in the foregoing statement, sets the maximum charge for railroad service.[2] A minimum level may also be fixed: rates

of wood to burn. He figured out what the coal could be put on the cars for at the mines, and he figured out that the difference was the rate that the railroad company would have to charge to move the traffic. This is typical of the way in which rates are made. The rates are made to move the traffic."

[1] Increased Rates, 1920, 58 I. C. C. 220, 242; Reduced Rates, 1922, 68 I. C. C. 676, 727.

[2] Charging on the principle of what the traffic will bear is not a practice limited to the railroad business. Whenever there is production under conditions of joint cost, a cost basis of price determination is out of the question, because cost is not determinable. When use was found for cotton seed, the contribution to the joint costs of planting, cultivating, harvesting, and growing which the seed could make was not determined except upon the basis of the demand. The cotton grower, selling his seed, got what the traffic would bear. The principle is applicable in other directions as well. The simplest illustration is that of the professional man: the lawyer, the dentist, or surgeon. The latter is scrupulous to use the same care and skill for the poor patient as the well-to-do. But his charge in the one case may be many times the charge in the other. A department

must cover at least the variable expenses created by the movement of the particular goods, and should contribute something in excess to cover "overhead" or constant costs. Between these two levels there is a "zone of reasonableness, indefinite and variable." No single standard can be established by which to judge the reasonableness of the railroad rate on a particular movement of traffic. Total cost is not ascertainable. Instead, there is a "flexible limit of judgment which belongs to the power to make rates."[1]

store sells shoes or frocks at the beginning of a fashion season at top prices, but shades these as the end of the season approaches. The final slash in prices is marked by a clearance sale. The surgeon and the storekeeper is each charging what the traffic will bear. Or identical goods are sold to persons of different incomes at different prices. The "exclusive" shop, in assessing a higher price, is charging what the traffic will bear.

The electric light and power station illustrates the same principle, and presents a close analogy with the railroad business. The same governing economic peculiarity is found: essential heavy investment in specialized fixed plant which must be provided in advance to an extent adequate to meet the maximum demand, the "peak of the load." There is the further parallel that the plant has two distinct uses: it may generate current for lighting and for power. And inevitably, if the plant is used solely for one purpose or the other, there must be unused capacity. The demand for lighting purposes, which creates the peak of the load, depends upon the time of year, but tends to concentrate in the late afternoon. Sound business judgment directs that the manager of an electric plant encourage the use of power during the day in order that the plant may be more fully utilized during the maximum period. Electric household devices will create a demand for current on wires ordinarily "idle" during the daylight period. In fixing the rates for power, therefore, the electrical plant can go as low as is necessary to create the business, provided some contribution above the added or variable cost is secured. In essentials the parallel is complete.

Maximum levels of charge the electrical manager also finds: the principle that his rates may be regulated so that on the sum total of business done he earns only a fair return, has been long established. But there are competing relationships also which are important. The maximum rate which may be charged for lighting is set roughly (taking account of greater convenience) by the cost of a substitute service, gas or oil lamps; the rate which may be charged for power is set on the same basis: the cost of generating power by steam engine, or isolated dynamo. In those communities in which there is no demand for current for power, the lighting business must carry the whole cost; but where power can be sold, the cost is shared, the maximum power rate being set by the cost of the competing service, the minimum rate being set by the amount of the cost added by the necessity to operate during the day. Between those levels, the manager will seek to establish the power rate from the power business which will insure the fullest utilization of the plant. The contributions from the power business will make possible lower rates for light if the total return is regulated. It is not true that, without the power business, light rates would be lower.

[1] "The Courts recognize that there is abundant play for what the present

Within this "flexible limit," rates are assessed roughly on the basis of the value of the commodity per 100 pounds.[1] Specific rates are frequently published on commodities whose production or distribution (or both) is highly localized, to meet competitive needs. It happens that these are usually commodities in whose market price the freight rate occupies a large place, or com-

Chief Justice so admirably described as 'the flexible limit of judgment which belongs to the power to fix rates,' 206 U. S. 26." Advances in Rates—Western Case, 20 I. C. C. 307, 316. This quotation, from A. C. L. R.R. Co. *v.* N. C. Corp. Com., 206 U. S. 1, has proved a favorite quotation with the Commission and has been many times cited: I. & S. Docket No. 26, 22 I. C. C. 604, 624; L. & N. Coal & Coke Rates, 26 I. C. C. 20, 28; Youngstown S. & T. Co. *v.* P. & L. E. R. R. Co., 29 I. C. C. 428, 435; Excelsior from St. Paul, 36 I. C. C. 349, 365; Arlington Heights Fruit Exch. *v.* S. P. Co., 45 I. C. C. 248, 250; Sloss-Sheffield Steel Co. *v.* L. & N. R. R. Co., 51 I. C. C. 635, 637.

[1] This value of the commodity rule has long received the sanction of the Commission: "The value of the article, not its use, is one of the determining factors," Western Classification Case, 25 I. C. C. 442, 499.

With equal vigor, however, the Commission has asserted that "value, though important, is not the controlling element," a holding, too, more than once reiterated: London Machinery Co. *v.* A. T. & S. F. Ry. Co., 34 I. C. C. 383, 384; Western Felt Works *v.* Wabash R.R. Co., 40 I. C. C. 7, 8; Official Classification No. 44, 47 I. C. C. 91, 98.

The reason for the qualification of the "value" principle is not hard to find. Railroad managers have been compelled also to give consideration to the weight per cubic foot of commodities transported. In order to insure proper compensation for the transportation of a carload of freight, it is necessary, in fixing the rate per 100 pounds, to take into account the fact that a light and bulky article will occupy larger space in the car and contribute less to the total weight per cubic foot of car space occupied, than will a heavy article of equal size. Since it usually happens that the light and bulky commodities are those having high value per 100 pounds, what are really two distinct principles of rate making have been the more readily confused, and sometimes stated as a single principle.

The practice of basing rates upon the density of the goods delivered to the carrier is disclosed in the lower charges on wool in bales as compared with wool in bags, by the lower charges on commodities "knocked down" (KD) or "nested" (one inside the other) than on the same articles "set up" (S. U.). National Wool Growers' Asso. *v.* U. P. R.R. Co., 49 I. C. C. 55; Rates on Excelsior and Flax Tow from St. Paul, 29 I. C. C. 640; Showers Bros. Co. *v.* A. A. R.R., 48 I. C. C. 518, 520, following Fond du Lac Church Furnishing Co. *v.* C. M. & St. P. Ry. Co., 21 I. C. C. 481; Classification Nesting Rule, 37 I. C. C. 477, 478. Intensive utilization of rolling stock when used for moving light and bulky commodities is also secured by a rule which provides variable minimum weights to be charged for carload shipments, dependent upon the size of the car ordered. Noble *v.* B. & O. R.R. Co., 22 I. C. C. 432; Consolidated Classification Case, 54 I. C. C. 1, 24. Rules fixing carload minimum weights are established for the same purpose. The governing principle is that the minimum weight shall approximate the possible maximum of the car capacity. Dallas Cooperage Co. *v.* G. C. & S. F. Ry. Co., 45 I. C. C. 468, 469. Where the commercial requirements do not warrant the maintenance of this standard, either an "any quantity" rate may be established, or a lower minimum weight provided. Western Classification Case, 25 I. C. C. 442, 443, 607.

modities sold on a narrow margin, especially through the jobbing trade. Rates which apply on specific commodities between stations named are usually, although not exclusively, carload rates.[1] They are known as commodity rates. In European countries, commodity rates are known as "exceptional" rates. They are such in the United States: exceptions to the general basis of rates established by the publication of the Consolidated Classification.[2]

[1] On the long haul transcontinental business where business men in such cities as Spokane compete with business men in Seattle in the distribution of high grade commodities, there are commodity rates on carload movements of such high-grade traffic as drugs, medicine, chemicals, automobiles, rubber tires, and musical instruments. These rates were given by the rail lines to attract business in competition with the water lines from the Seaboard to the Pacific port, applying the principle of charging what the traffic will bear, without diversion. Intermediate Rate Asso. *v.* Director General, 61 I. C. C. 226, 241.

The status of less than carload commodity rates in the same territory—"practically all . . . due to water competition"—is discussed, Transcontinental Commodity Rates, 48 I. C. C. 79, 87.

[2] The Consolidated Classification, first effective Dec. 30, 1919, is one of the distinct contributions of the period of Federal control. In its First Annual Report (1887) the Commission emphasized the necessity of a single classification for the entire country. Almost every year this necessity had been reiterated: a uniform classification was urged as necessary in the interest of consistency, in the interest of equality of treatment, and of surety of charge. To this end, in 1905, a Uniform Classification Committee was formed, a purely advisory body, concerning itself only with general rules applicable to all traffic movements and not at all with ratings. Its power was solely a power to recommend to the railroads party to one of the three sectional classifications. It had no power to compel adherence to its recommendations. There were so many selfish and sectional interests to be compromised that progress was slow, because unanimity, or agreement to conform to the will of the majority, always essential for cooperation by competitors in any price setting arrangement, is especially so in freight classification. The operation of the railroads as a unit under Federal control eliminated the veto power of a single road or group of roads.

From a legal and technical standpoint, the identity of the Official, Western, and Southern Classifications has been preserved, and the Consolidated Classification is really three classifications in a single volume—filed with a separate I. C. C. number for each territory. But it is hardly larger and certainly no more complicated than had been any one of the three general classifications formerly in use. The Consolidated Classification, furthermore, marks the substantial attainment of one of the purposes of regulation: publication of ratings in a form intelligible to others than experts. Its adoption makes possible the general knowledge, by business men, of the rates paid by competitors. It remains true that the consolidation, without full uniformity, cannot eliminate the possibility of discrimination when competitors in a common market find that, because of a difference in rating, a lower charge is assessed some one competitor than would be fairly applicable. The uniform descriptions and rules are especially important when shipments move from points in one classification territory to points in another, the rates "breaking" at the rivers—north and south

§ 9. The classification is, essentially, an index of commodities, grouping those which pay the same charge under "classes" designated by numbers or letters: 1st class, 2nd class, Class A, Class B, etc.,[1] assigning to each a classification "rating." By so grouping the commodities, the classification thus serves as a key to class rates which are published in terms of dollars and cents: the 1st class rate is the highest, the 2nd class rates being next, etc. Class rates are universally published. Usually the relationship of the lower class rates to the 1st class rate is something like the following:

Class	*1*	*2*	*3*	*4*	*5*	*6*
Per cent	100	85	65	50	35	28

Only by knowing the classification rating, and the class rate applicable can the charges be calculated for the movement of goods on which no commodity rate has been published.[2] It follows that charges paid may be advanced or reduced by changing classification ratings while leaving rate schedules untouched, or by changing rates while leaving ratings untouched.[3]

of the Ohio. Formerly, on some commodities, the same rule of packing, or the same minimum weights, might not apply in the two territories; for a commodity to take a different rating in one territory than in others was not exceptional. In quoting prices or estimating costs of supplies from alternate sources of supply a business man might find it necessary to consult all three books. The system was confusing, cumbersome, and expensive. These obvious disadvantages the Consolidated Classification has in large degree removed.

[1] The Supreme Court, Director General *v.* Viscose Co., 254 U. S. 498, defined classification as "grouping—associating in a designated list commodities which, because of their inherent quality or value, or of the risks involved in shipment, or because of the manner or volume in which they are shipped or loaded, and the like, may justify and conveniently be given similar rates."

[2] If it is desired to destroy the application of the classification and the class rates to movements of freight, either a commodity rate must be published or an "Exception to the Classification." A "class and commodity tariff" contains both kinds of rates and, sometimes, carries on "alternate" rule providing that the lower charge, whether the commodity rate named, or the class rate indicated by the classification rating on the particular article shall apply. Such an alternate rule applies only to rates carried in the same issue. Indianapolis Freight Bureau *v.* C. C. C. & St. L. Ry. Co., 16 I. C. C. 56, 70.

[3] Advances made by changing classification ratings caused not a little of the hard feeling which developed between shippers and carriers following 1900. Tariff rates were not changed, and so, though there was a semblance of truth behind the statements that rates had not advanced, the business man found that his freight bills were higher. No protestations or denials satisfied him. He knew.

The relationship of the classification rating to the freight charges is, therefore, such that the Commission, in its work of fixing "reasonable" and "non-discriminatory" rate adjustments, will usually, when complaint is filed against the alleged unreasonableness or discriminatory character of the charges on a single commodity, consider the problem as one in classification rather than as a problem in rate adjustment. If the commodity has been lifted out of the classification by the publication of a commodity rate, the situation is sometimes different, sometimes the same: the same, when the complaint is against the rate level on the whole commodity schedule; different, when the claim is that the rates on the commodity, considering especially the service measured by distance, are inequitably adjusted, *inter se*. In the latter event the problem is essentially one of adjustment of rates on the same commodity; in the former, one of adjusting fairly charges on different commodities—really a problem in appraising what the traffic will bear. Indeed, the principle of charging what the traffic will bear—largely, though not exclusively, with respect to what the traffic will bear without destruction rather than without diversion—emerges in railroad practice largely through the device of classification. It is the governing principle of freight classification, because it is the governing principle of all rate making.

The actual task of assigning ratings to commodities, in view of the variety of factors drawn into consideration, must be a work for experts.[1] Judgment must be the final determinant, after

[1] There are the four classification committees: the Official, Southern and Western, and the Consolidated Classification Committee, composed of the chairmen of the three regional committees. The Consolidated Classification Committee has general jurisdiction, and publishes the volume. This Committee will usually take jurisdiction, where the shipments of the commodity move freely on class rates over the whole country, and a rating is desired under all three regional headings, or change in rates, descriptions, packing specifications, or minimum weight for general and uniform application is sought. If, however, the change is likely to affect movements of freight assessed under sets of tariffs governed by only one of the regional ratings, application may be expedited by reference to the Committee whose deliberations alone will be final.

The procedure of the Classification Committees is not greatly different from that of regulatory bodies. It is quite informal. The Committees are each composed of permanent members who give their full time to the work. All are experienced traffic men. The Southern and Western Classification Committees have three members each, the Official Classification Committee, four. Each holds hearings, as scheduled for time, place, and subject, at which the shippers can be heard, either in support of reductions

all; no mere mathematical formula can be substituted. The very task of classification is a process of discrimination, and a law which seeks to prevent undue preference of commodities aims to insure equal treatment of shippers whose goods have substantially the same transportation characteristics. Not all discrimination but only "unjust discrimination" is barred. Classification is thus the device whereby the principle of charging what the traffic will bear is made effective for everyday use. And the Consolidated Classification, published under the scrutiny of the Commission, represents the resultant of its opinions, and the opinion of carriers and shippers. Through its use, the essential principles of classification and the assignment of bases for commodity rates become of everyday application in business affairs.

or in opposition to advances. Ordinarily the Chairman presides, a record is made of the evidence, and the Committee decides the issue by vote which is formally recorded. The evidence considered as pertinent in a hearing before the Committee bears upon elements which go into the determination of a "reasonable" classification rating: value per cubic foot, method of packing, extent of movement, weight loaded into a standard car.

But it does not require a lawyer to present the case. The atmosphere is usually that of a friendly conference, not of a fight. The aim of the Committee is to meet the traffic needs of the country, to protect the carriers from undue pressure,—to do even-handed justice. There is no appeal from a decision of the Committee except to the Interstate Commerce Commission by filing a formal complaint. But the vast number of cases are handled to the satisfaction of all parties by the Classification Committee, which, after all, acts in the capacity of a court. Its members are truly "informed by experience."

CHAPTER VIII

GENERAL RATE LEVELS

§ 1. The amount of gross revenue of railroad carriers is determined by the volume and character of freight tonnage and of passenger travel and by the general rate level on which the traffic moves. The first factors depend in no inconsiderable degree upon the general business condition of the country. The second, the general rate level, while originally the resultant of competitive rate-making, was, by the rule of rate making, placed strictly under the control of the Interstate Commerce Commission.

No function of railroad regulation is of greater public importance than the fixation of a general rate level. While individual shippers are primarily interested in particular rates, the general level of all rates under any system of rate making must be determined in respect to the revenue needs of the carriers. If expenses of operation increase out of proportion to an increase or decrease in the volume of traffic, the general rate level must be advanced or bankruptcy will follow; immediately, perhaps, on the "weak roads," in the long run, even on the strongest. If expenses decline so that a rate level once necessary to insure a fair rate of return becomes the medium of extortion, the public has now asserted the right to reduce the general level of rates.

Even should the government operate the railroads directly these same principles must control. This the public learned during 1918 when the Director General of Railroads advanced freight rates twenty-five per cent and passenger fares to at least three cents per mile throughout the country to meet a general advance in labor and material costs. The failure to make further

rate increases during the period of Federal control to meet further increases in cost of operation resulted in transferring the burden of maintaining the railroads from rate payers to tax payers—a make-shift which could be justified only as an emergency measure, and which did not long have the support of popular approval.

§ 2. Until the beginning of the present century little concern was given by any one to the general level of rates. The competitive system of rate making, coupled with the increasing efficiency of operation, had resulted in a general downward tendency of railroad rates. Costs of operation had likewise shown a downward tendency. All of the governing economic forces had operated to reduce rates, and competition accelerated the process. This tendency was further accelerated, in some portions of the country, by state legislation affecting particular rate structures.

The state laws, however, followed a period when the falling tendency of the rate level had slowed down. As early as 1900 there was complaint of advances in costs made by the carriers, and in 1903 the railroads sought the approval of the Interstate Commerce Commission as to advances in grain, grain products, packing-house products and dressed meats, contending that unrestrained competition had resulted in an unduly low rate level and that they were facing an increased expense of operation. Their case was not presented with the thoroughness that has been customary in later years, and the Commission withheld its approval as to a general increase, although permitting advances on particular commodities.[1] This authorization concerned traffic moving only in the territory east of the Mississippi north of the Ohio and Potomac Rivers—"Official Classification Territory."

The public having become accustomed to a downward tendency in railroad rates—the revenue per ton per mile of all freight having declined from 9.41 mills in 1890 to 7.29 mills in 1900—it was not in a receptive mood for the contentions of the railroad managers that they must meet increasing costs of operation. Throughout the first decade of the present century this attitude of mind on the part of the public was dominant. In 1907, throughout the Middle West, state legislatures quite generally enacted maximum passenger fare statutes, reducing the fares

[1] Re Proposed Advance in Freight Rates, 9 I. C. C., 382.

from three cents to two cents per mile. These reductions the carriers frequently found it expedient to apply to interstate travel as well. In many states, maximum freight rate scales were also enacted. Whenever the railroad managers advanced their claims of increased costs and need for additional revenue, their claims were challenged on the ground that their accounting systems were so inaccurate that no proper conclusions could be drawn; and, more particularly, it was argued that instead of asking for advances in rates they should exert greater efforts to effect economies of operation through increased efficiency. The public mind was not receptive to any advance in the general rate level.

In 1910, the eastern lines, those operating between the Atlantic Seaboard and Chicago and St. Louis, filed tariffs containing rates on a generally advanced basis; and tariffs containing higher rates to apply west of the Mississippi were filed by and on behalf of the western lines. It was these proposals which led to the grant, to the Commission, of the suspension power. Pending action by Congress, which then was in session and concerned with amendments to the Interstate Commerce Act, the railroads "voluntarily" (though under pressure from the administration), postponed the effective dates of their tariffs until the suspension power should be in the law. Acting under the power granted by this amendment the Commission suspended the increased rates, and two investigations resulted—one in the East and one in the West.[1]

The carriers directed particular attention to increases in wages during the period from 1901 to 1910. On the Chicago & North Western for example, wages increased 20 to 26 per cent for trainmen, 38 per cent for firemen and 20 per cent for section laborers. These, it was alleged, were typical. These wage increases had been granted because of demands from the men, due, basically, to a rise in the general price level. The high cost of living had already become a subject of everyday conversation—it was not simply an intellectual toy of economists. There had also been considerable advance in costs of materials for railroad

[1] Advances in Rates—Eastern Case, 20 I. C. C. 243; Advances in Rates—Western Case, 20 I. C. C. 307. The postponing of the effective date of their tariffs was also forced on the railroads by the injunctions referred to above, p. 61, note.

operation and maintenance. Further, the railroads contended that the failure of general rate levels to keep pace with increased costs of operation was resulting in an impairment of the credit of the companies.[1]

In two lengthy opinions the Commission ordered the proposed advances in rates withdrawn. It stated, as its conclusion from the evidence, that the claim of an impairment of railway credit had not been sustained. Among other things, it pointed out that the decline in the average rate of interest paid by railroads on their funded debt from 4.69 per cent in 1895 to 3.9 per cent in 1909 represented a saving of seventy-seven million dollars on the total debt. It also declined to accept the carriers' contentions that they were entitled to earn a rate of six per cent or more upon the book cost of their properties, pointing out numerous frailties in the accounting methods by which such book costs had been built up. It met the argument based on increased costs of operation with the suggestion that the carriers exert themselves to greater efficiency. "No general advance in rates should, however, be permitted until carriers have exhausted every reasonable effort for economy in their business. . . . We cannot escape the impression that railroad operators have not given to this important subject the attention which it deserves."[2]

The opinion in the Eastern case further asserted as a principle of railroad regulation a doctrine, since abandoned, or at least modified:

> "A fundamental economic fallacy underlies the proposition that we should permit rates otherwise unreasonable for the purpose of bolstering up the credit of our railways. It would be much better for the government to guarantee these bonds than to permit the people and the industries of this country to bear the burden of unreasonable transportation charges."[3]

The view thus expressed was fallacious,—now admittedly so—in that it assumed the possibility of determining the reasonableness of a rate level without regard to the expenses of operation and the revenue needs of the carriers.

[1] The evidence, briefs, and exhibits in these cases were reprinted in full as government documents: Evidence in the Matter of Proposed Advances, Sen. Doc. 725, 61st Cong., 3d Sess., 10 volumes.
[2] 20 I. C. C. 243, 279.
[3] 20 I. C. C. 243, 253.

While the 1910 rate cases resulted unsatisfactorily for the railroad managers, they marked a real turning point in the general level of railroad rates in the United States. Even though the railroads were prevented from advancing their rates as they sought to do, the country rather generally accepted the notice which the effort had carried with it—that the downward tendency of the general rate level had come to an end.[1] Many factors contributed to this situation. Doubtless the inroads which unwise state legislation had made upon railroad revenues had a considerable effect, as likewise had the demands of the public for better and safer railroad service.[2] More pronounced in the effect upon railroad revenues was the general trend of advancing labor and material costs. Wholly aside from any inadequacies in the presentation of the railroads' contentions or the infirmities of their statistics, the underlying fact is strikingly evident to any one who reviews the situation from the standpoint of the present. The upward trend in living costs could not have passed by the transportation systems of the country. If the general level of the prices at which they were required to sell the transportation which they produced was to be further reduced in the face of increasing costs for labor and material, it was certain that upkeep and extensions of the railroad plant would have to suffer, or that bankruptcy would ensue. Perhaps the former of these alternatives would be followed by the latter.

Neither the public nor the Interstate Commerce Commission reacted promptly to the change in underlying conditions. It had become popular to attack railroad companies as capitalistic monopolies whose interests would always be adverse to the public good. Exposure of abuses, trickery, and even corruption had given emphasis to the bitterness of the attack. Railroad managers did not have the confidence of the public, and office seekers made the most of their opportunity. The Interstate Commerce Commission, but recently invested with a real power over rates,

[1] Commissioner Harlan, concurring in the Fifteen Per Cent Case, said: "The whole discussion, unusually free from selfish contentions on the part of the shippers, and approached by the carriers, as I understand the record, in no selfish spirit, leaves me with the conviction that the shippers at large are ready for a substantial increase in their rates provided it will result in an early betterment of their transportation service and in a rate structure free from discriminations." 45 I. C. C. 303, 328.

[2] 20 I. C. C. 243, 276.

was slow to yield to claims of the necessity to increase rate levels. Instead it accepted, as reasons for denying increases, all sorts of obstructive arguments—the inadequacy of the proof, infirmities of the railroad accounts, and the possibility (too often merely theoretical) of meeting increased expenses by economies of operation and management. Perhaps this was wisely done. The public was not ready for favorable action upon the railroad demands. If the Commission had accepted them on their face value, new legislation not improbably would have ended its existence, or at least have curtailed its activities.

§ 3. When, in 1914, the eastern carriers again appeared before the Commission alleging revenue needs in the face of rising costs, coupled with the impairment of credit, as grounds for increasing the general rate level by five per cent, the Commission at first denied the increase except as to the lines in the territory between the Buffalo—Pittsburgh—Parkersburg line and the Mississippi, the "Central Freight Association" roads.[1] Later the Commission extended its permission throughout the entire eastern territory except as to particular commodities.[2] But, when the western carriers sought a similar advance, although proposing to apply it to particular commodities, the Commission denied their claim of right to increase their rates except on coal and a few other, but relatively unimportant, commodities.[3] A few months later the Commission authorized the western carriers to increase passenger fares from two cents per mile to 2.4 cents and 2.6 cents per mile in different parts of their territory, thus eliminating in part the effect as to interstate traffic of the state legislation of 1907 which had given to this district its two cent per mile basis in contrast with the two and one-half cent per mile basis effective in the East.[4]

In all of these cases the showing of the carriers was most exhaustive. It is now readily apparent that they were facing rising costs of operation and that, with the increase in price of other commodities and other services, a continuation of the repressive tendency of legislation and regulation could have but one ultimate result—financial disaster and government owner-

[1] Five Per Cent Case, 31 I. C. C. 351.
[2] 32 I. C. C. 325.
[3] 1915 Western Rate Advance Case, 35 I. C. C. 497.
[4] Western Passenger Fares, 37 I. C. C. 1.

ship. But the political opponents of the railroads and the representatives of the shippers were alert to emphasize inadequacies of proof, to assert the inefficiency of railroad management, and to gaze into the future with far greater optimism than the facts, as proved by subsequent events, would justify.

The following year, 1916, was the greatest year from the standpoint of tonnage that the railroads in the United States had ever had: 1,317,246,000 tons of freight were originated; 1,049,000,000 passengers carried. The European War had speeded up industry in this country and the demand for transportation service was at its peak. The railroads were prosperous. Their greatest problem was to handle the tonnage offered, and while car shortages existed in some localities and as to some forms of traffic, the railroads taxed their physical plant to the limit and operated at a handsome profit. Those who had opposed the advances in general rate levels now pointed to the results of this year's operation as proof positive of the correctness of their prediction that the railroads could make money without advancing their rates. While the war abroad presumably had not been within the contemplations of these critics, they took advantage of the abnormal traffic resulting therefrom as demonstrating that the railroad managers had been unduly apprehensive in contending for rate advances.

But increased costs of operation resultant from the general prosperity of industry had its effect upon railroad labor. The cost of living advanced at an accelerated rate and the employees' organizations pressed demands for increased compensation. Strikes were threatened; and, finally, on September 3, 1916, Congress enacted the Adamson Bill, at the time generally estimated to increase the wage bill of the railroads by $100,000,000. Commodity prices continued to soar; and, in the first part of 1917, the railroads of the entire country resorted to the Interstate Commerce Commission with a petition for an increase in the general rate levels by 15 per cent. Again their opponents met them with the showing that, even while the proceeding was pending, there had been an increase in the movement of lucrative traffic which, if it continued, and if it could be handled by the railroads without car shortage, would enable them to weather the storm. The Commission in its decision ordered withdrawn all schedules

naming increased rates within the western district, and all schedules excepting only those applying to bituminous coal, coke and iron ore within the southern and eastern districts. The eastern carriers were permitted to increase their class rates.[1] In its majority opinion the Commission stated the conviction that no condition or emergency existed which would permit a general increase of rates. It stated that the things which the railroad managers had said several months before would happen, had failed to happen, and it declined to view the future with alarm. It announced, however, that, through the medium of monthly reports of carriers, it would keep in close touch with the operating results of the future and pledged that, if the fears of the carriers were realized, or their realization was imminent, the Commission would meet that situation by such modification or amplification of its conclusions and orders as was shown to be justified.[2]

§ 4. The United States was already at war when this decision was rendered, and, at the end of the year, the government took control of the railroads in the interests of the successful prosecution of the war. The responsibility of the railroad managers for the increase of general rate levels to meet increased expenses temporarily came to an end. In its stead was substituted the responsibility of the government to its tax payers.

The increased share of railroad gross earnings which went to pay labor and material costs during the period of Federal control are discussed elsewhere.[3] To meet the first wage increase of approximately $600,000,000, the Director General advanced freight rates and passenger rates, effective June 25, 1918. The subsequent increases in labor and material costs were not transferred to the rate payers so long as the government retained control of the railroad properties. Deficits resulted which were borne by the tax payers as one of the burdens of the war. The Bureau of Railway Economics prepared the following summary of the estimated financial loss to the government from railway operation, January 1, 1918 to September 1, 1920, the end of the

[1] Fifteen Per Cent Case, 45 I. C. C. 303.

[2] 45 I. C. C. 303. Subsequently, by order dated March 12, 1918, the Commission without formal report permitted the eastern carriers to advance rates on additional commodities.

[3] Below, Chapter XXV.

guarantee period. This statement is a summary of official statistics, so far as estimates may be called statistics:[1]

I. *Estimated government financial losses arising from Federal control, January* 1, 1918 *to March* 1, 1920:

Estimated excess of operating expenses and rentals over operating revenues:	
Class I railways under Federal control[a]	$677 513 152
Other privately owned properties under Federal control[a]	43 011 129
American Railway Express Co.[a]	38 111 742
Inland waterways[a]	2 449 739
Expenses, U. S. Railroad Administration to March 1[a]	13 954 980
Amount needed to replace materials taken over[a]	85 204 618
Net interest and other debit adjustments[a]	40 233 396
Short-line claims, fire losses, loss and damage, etc.[b]	100 000 000
Undermaintenance, additional compensation, etc.[b]	200 000 000
Net payments on account of deficits, railways not under Federal control[c f]	6 825 512
Payroll, U. S. Railroad Administration, March 1, 1920 to December 31, 1921[d]	5 636 675
Rents, traveling expenses, supplies, etc., U. S. R. A., March 1, 1920 to December 31, 1921[d]	9 598 087
Total	$1 222 539 030

II. *Estimated Government financial losses for the guaranty period, March* 1 *to September* 1, 1920:

Estimated amount necessary to make good the government guarantee[e]	$536 000 000

III. *Grand Total* $1 758 539 030

[1] The Bureau cites its authorities for these figures as follows:

a. Testimony of former Director General Hines before subcommittee, House Committee on Appropriations, April, 1920, p. 84.
b. Letter of Director General Davis to Chairman Good, House Committee on Appropriations, May 5, 1921.
c. 35th Annual Report I. C. C. (1921), p. 22.
d. Report, Director General Davis to the President, February 8, 1922.
e. 35th Annual Report I. C. C. (1921), p. 23.
f. 35th Annual Report, I. C. C. (1921), p. 22.

The subsequent decision by the Commission (Finance Docket No. 1600, decided Feb. 9, 1922) interpreting the word "deficit" as used in paragraph (a) of section 204 of the Transportation Act, 1920, as a deficiency or decrease in a carrier's railway operating income for that portion of the period of Federal control during which it operated its own railroad as compared with its average railway operating income for the corresponding portions of the test period meant a material increase in the original estimate of $6,825,512. Construction of the word "Deficit," 66 I. C. C. 765.

When, in 1919, it was apparent that the public demanded a restoration of private operation of the railroads, Congress faced the necessity of providing immediate relief from the deficits incident to Federal control, and the failure to keep revenue ahead of expenses.

§ 5. In the framing of legislation to terminate Federal control and to accomplish a return to railroad operation by the corporations, it was recognized in both houses of Congress not only that the revenues of the railroads were insufficient to meet the costs of operation, but that the railroad corporations should immediately proceed with extensions, additions and improvements to their properties. Recent experience emphasized that they should make large expenditures for additional equipment and enlargement of terminals to overcome a car shortage which existed generally on all lines of railroad and to minimize the severity of any repetition.[1] Senator Cummins said in the presentation of his committee's report on the floor of the Senate: "Mr. President, private operation of railways cannot be continued as a permanent policy unless there is a radical change in our system of regulation."[2]

The rule of rate making was provided to meet this situation. It directed the Commission to initiate rates which should take into account the net return on the aggregate value of the property of carriers, within such rate groups as the Commission might designate. It was concerned with the rate level. For the two years following the passage of the Act, Congress provided that the rate of return should be five and one-half per cent, with an addition at the option of the Commission of one-half of one per cent for additions and betterments. Thereafter the rate of return was to be determined by the Commission. For the immediately succeeding period the Commission, by its opinion in the Reduced Rate Case, set the rate at five and three-fourths per cent.[3]

§ 6. Upon the return to private operation following the passage of the Transportation Act, the Commission undertook an inquiry into the revenue needs of the carriers. While this was

[1] Remarks of Senator Kellogg, 66th Cong., 2d Sess., 59 Cong. Rec., Part I, p. 327.
[2] 59 Cong. Rec., Part I, p. 126.
[3] Reduced Rates, 1922, 68 I. C. C. 676.

pending, the wages of railroad employees were increased by the estimated amount of $618,000,000. The Commission gave this fact consideration in its decision. It predicated the revenue needs of the carriers upon the basis of a constructive year in which it adjusted the actual performance figures of the preceding year's operations on the basis of changed conditions and increased costs. It divided the country into four rate groups—Eastern, Southern, Western, and Mountain-Pacific. It tentatively determined the aggregate value of all railroad property held for and used in the service of transportation at $18,900,000,000; and, with this as a base, authorized advances in rates which it estimated would produce a rate of return of six per cent on this amount. A uniform increase of 20 per cent was authorized in passenger fares and in rates on milk and cream, while freight rates were increased 40 per cent in the Eastern district, 35 per cent in the Western, 25 per cent in the Southern and Mountain-Pacific groups, and 33⅓ per cent inter-territorially.[1] The carriers published the increased rates effective August 26, 1920, on interstate traffic and sought similar increases in the general rate level on state traffic. When they failed to convince the state authorities they appealed to the Interstate Commerce Commission for relief. That body found it necessary to issue orders in respect to intrastate rates in more than a score of the states where recalcitrant state commissions or rigid maximum fare laws had prevented a uniform advance in the general level on both interstate and state traffic. The Supreme Court sustained the Commission's exercise of power in this respect.[2]

§ 7. Within a few months after the 1920 increased rate level was established, a severe business depression affected all industry throughout the country. By November, 1920, it was realized generally that the period of price inflation which had followed the armistice had come to an end and that there would be severe deflation in all lines. Railroad earnings reflected the decline in tonnage. It soon became apparent that in so far as the rates had been predicated upon a continuance of current tonnage they would fail to produce the expected rate of return. The severity

[1] Increased Rates, 1920, 58 I. C. C. 220, 302.
[2] R. R. Com. of Wis. *v.* C. B. & Q. R. R. Co., 257 U. S. 563.

of the business depression, however, clearly indicated, even to the railroad managers, that the country was in no mood for further advances in rates and that the railroads must bear the burden of loss in tonnage and revenue as best they could.

Among the industries, agriculture was the first to feel the full effects of the depression. The values of agricultural products, live stock and meats suffered a rapid decline. Amid the clamor for relief and remedy, the high level of freight rates was emphasized more generally than the economic forces which were really responsible for the crisis. It was the story of the middle '70's over again. Freight rates became the target of dissatisfaction, although the Interstate Commerce Commission assured the public that it was "not persuaded that it (high level of freight rates) has been more than a minor factor in bringing about distress." [1] But the farmer was not convinced and as he represented a powerful political group, his complaint was given recognition. High freight rates were acclaimed as a primary cause of the depression by men high in the councils of the government. Rate reduction, even though dependent upon reducing the wages of railroad employees, was demanded. The President made a personal call on the Interstate Commerce Commission.

Three cases were soon presented to the Commission for decision, one concerning rates on live stock, a second, rates on grain, grain products and hay, and the third, the rates on southern hardwood lumber.

In the Live Stock Case the Commission reiterated previously announced doctrines that "the right of a railroad to charge a certain sum does not depend at all upon the fact of whether its customers are making or losing by their business." It found that the carriers were not earning the rate of return prescribed in the Transportation Act, 1920, and refused to enter an affirmative order. Instead it recommended to the carriers, as desirable in the light of economic conditions, that the rates on long hauls of live stock be reduced 20 per cent where the rate exceeded fifty cents per hundred pounds.[2] This the carriers did. In the Hay and Grain Rate Case, the Commission ordered reductions in the western district of approximately thirteen and one-half per cent

[1] Rates on Grain, Grain Products and Hay, 64 I. C. C. 85, 99.

[2] National Live Stock Shippers' League *v.* A. T. & S. F. Ry. Co., 63 I. C. C. 107.

on wheat and hay and of twenty-one per cent on coarse grains. This it did upon the assertion that the duty of initiating rates to adjust rate levels to revenue needs was, to use its language, "a continuing duty and looks to the future." While stating that "the purpose of section 15a was undoubtedly to better stabilize the credit of railroads, reassure investors, and attract capital to the railroad industry," the Commission declared:

> "It does not constitute a guaranty to the carriers, nor is the obligation cumulative. We are not restricted by past or present statistics of operation and earnings. These are serviceable only as they illuminate the future. What is contemplated by the law is that in this exercise of our rate-making power the result shall reflect our best judgment as to the basis which may reasonably be expected for the future to yield the prescribed return."[1]

It was estimated by the carriers, at the time, that the reductions in the rates on grain and live stock reduced revenues in the western district in excess of $40,000,000 annually. It was conceded that increased traffic in these commodities could not be expected to result. The Commission's order in the Southern Hardwood Lumber Case again required reductions in rates, this time under the guise of restoring a formerly existing rate relationship.[2] Referring to its recent decision in the grain case the majority of the Commission characterized that decision as a prediction of the future based on the fact that, for a short time prior thereto, the carriers of the western district were earning a return "somewhat in excess of the return to which they were entitled under the Transportation Act."[3] The period referred to was a single month, August, 1921, and the adoption of a single month to determine revenue needs was a striking departure from past practice.[4] Nor was the rate of return sustained in succeeding months.[5]

The carriers themselves sought to appease the growing demand by a voluntary reduction of ten per cent in all rates on the products of the farm, ranch and orchard, a policy bitterly assailed by

[1] 64 I. C. C. 85, 99.
[2] Southern Hardwood Traffic Asso. *v.* I. C. R. R. Co., 66 I. C. C. 68.
[3] 66 I. C. C. 68, 73.
[4] 64 I. C. C. 85, 97.
[5] The return was at the rate of 6.47 per cent for August; 5.20 for September; 5.80 for October; 3.29 for November; 1.48 for December; 3.5 for the year 1921.

associations of manufacturers as an attempt to buy off the most outspoken and politically powerful of any of the groups of shippers.[1]

§ 8. But all this did not suffice, because it was at best mere temporizing and could not convince. Finally, the Commission inaugurated another general rate investigation, undertaking to pass upon the general rate level on all commodities. Its conclusion, published May 16, 1922, was that freight rates should be reduced by ten per cent except where the same or a greater reduction had already been made.[2] To support this conclusion it predicted an increase in tonnage and a decline in some expenses of operation sufficient to enable the carriers to earn a return of five and three-fourths per cent on the aggregate value of their property, even under the reduced rates.

The Commission clearly asserted its right and its duty to determine the necessities of the present by the experience of the past, coupled with its own judgment as to the prospects of the future. This decision is the most important for the future of any of the decisions establishing general rate levels, not so much because of the rate reductions as because of the principles of rate making there announced. The figure for the value of the railroad properties fixed tentatively two years before was again used, in the light of later statistics. The Commission recognized the necessity of measures to rehabilitate railroad credit, and the need for enlargement of the railroad plant through increased expenditures for additions and betterments. It declined to enter upon doubtful predictions as to the possible savings of expense through greater efficiency of operation—a marked change from the views expressed in the earlier general rate cases. The Commission in the 1922 case clearly announced the acceptance of a grave responsibility: the responsibility for fixing a general rate level sufficiently high to insure adequate transportation for the public and successful continuance of private operation of

[1] Late in October of 1921, Commissioner Lewis caused to be prepared a statement for a member of the House Committee on Interstate and Foreign Commerce, Mr. Sanders of Indiana, to show rate reductions and readjustments effective subsequent to the 1920 advance. Thirty-seven general reductions on commodities moving in large quantities are listed and a multitude of minor and local changes. The lists fill a pamphlet of 40 pages: *Rate Reductions*, House Doc. 115, 67th Cong., 1st Sess.

[2] Reduced Rates, 1922, 68 I. C. C. 676.

the railroads. Regardless of the correctness of its prediction as to increased tonnage and declining expenses, it assumed outspokenly the responsibility of adjusting rate levels to the revenue needs of the carriers. The rule of rate making is established as a working tool.

In so acting the Commission did not unduly usurp the function of management, for it was only doing what the railroad managers since 1903 had been petitioning it to do—to adjust general rate levels to revenue needs. Both in 1920 and in 1922, only the general level of rates was fixed. Upon the rate levels so established the carriers were left free to adjust rates according to those traffic principles previously recognized by particular rate adjustments. It is to a discussion of these principles of rate making that the following chapters of this section are addressed. The mere determination of a general rate level is by no means the full function of the rate making power, either as exercised by the carriers or the Commission. So long as railroad rates are not simply tables of mileage rates, reflecting only comparisons of distance, it will be necessary for shippers and railroad managers alike to give consideration to the principles under which the propriety and lawfulness of particular rate adjustments must be determined.

CHAPTER IX

THE EQUALIZATION PRINCIPLE

§ 1. The requirement that rates may not be unduly discriminatory, or unduly preferential, extends to the rate adjustments affecting competing business men in different towns or localities. To call such discriminations "local discriminations" emphasizes relationships which are superficial. The newspapers can, of course, make a better story about the grievances of county or town, than they can about the order that was sold to a nearby retail dealer at a lower price than the local jobber or manufacturer would quote. Most of the discussion centers about the injustice to the city which is being "ruined" by the unfeeling railroad. But actually any preference, if preference exists, is a preference afforded business competitors. At the back of every agitation alleging "local discrimination" is some one whose motive should be appraised in terms of a possibly larger volume of business and an anticipated increase in profits if a more favorable basis of competitive rates can be secured. It may be immaterial to him whether his own rates are lowered, or his competitors' advanced. One thing is certain: no man ordinarily subscribes to a war chest unless it seems probable that, directly or indirectly, he will receive other benefits than those represented by an enhanced civic pride. A readjustment in freight rates means a readjustment in competitive business relationships.

The essential business problem is not, therefore, one of discrimination against Kansas City, Omaha or Duluth in favor of

St. Paul,[1] against Spokane in favor of Seattle,[2] or against Shreveport in favor of Dallas or Houston.[3] It is not one of preference of West Virginia coal fields to the detriment of Pennsylvania,[4] of Chicago as a manufacturing center to the detriment of Toledo or Indianapolis,[5] nor of Boston as a port of entry or trans-shipment to the detriment of New York or Philadelphia.[6] In "local discrimination," the business interests of the town are symbolized by reference to the whole community. The language of the Interstate Commerce Act makes this certain. But whatever of undue discrimination or preference may exist involves the relationships of competitive business men. The underlying problem is the same whether discrimination is alleged to arise: (1) because rates are equalized, although conditions are not substantially similar; (2) because rates are not equalized though conditions are substantially the same; or (3) because differences in rates do not measure fairly any dissimilarity of conditions.

It is not accidental that the great volume of complaints alleging "local discrimination" have come from the South and West. In the South and West, the cities and towns, notably the railroad junction points, serve a dual purpose. They are trade centers for the distribution of merchandise, and are also concentration points for the neighborhood agricultural and ranch products. Official Classification Territory is the great work shop, though as the population density has increased in the West, manufacturing has moved westward. The frontier for general manufacturing now is pushing even west of the Missouri River. Denver, Pueblo and the Salt Lake Valley have important manufacturing interests. Where population is congested, where business centers

[1] Burnham-Hanna-Munger Dry Goods Co. *v.* C. R. I. & P. Ry. Co., 14 I. C. C. 299; The Twin Cities Case, 33 I. C. C. 577; Second Duluth Case, 46 I. C. C. 585.

[2] Spokane *v.* N. P. Ry. Co., 15 I. C. C. 376; 19 I. C. C. 162; 21 I. C. C. 400; 23 I. C. C. 454; Intermediate Rate Asso. *v.* Director General, 61 I. C. C. 226, and the cases there cited.

[3] R. R. Com. of La. *v.* St. L. S. W. R. R. Co., 23 I. C. C. 31; R. R. Com. of La. *v.* A. H. T. Ry. Co., 48 I. C. C. 312, and the intervening cases there cited.

[4] Boileau *v.* P. & L. E. R. R. Co., 22 I. C. C. 640; Lake Cargo Coal Rates, 46 I. C. C. 159.

[5] Indianapolis Chamber of Commerce *v.* C. C. C. & St. L. Ry. Co., 46 I. C. C. 547; Traffic Bureau, Toledo, *v.* C. H. & D. Ry. Co., 43 I. C. C. 446; Proportional Rates to Ohio River Crossings, 43 I. C. C. 458.

[6] In re Import Rates, 24 I. C. C. 78, 678; 27 I. C. C. 245.

and manufacturing centers, and railroad lines are close together, there is not the same play given the competitive forces as when trade centers are scattered. In the South, the mill villages are merely supplementary to the general economic organization; most of their output is shipped North, and the great bulk of the cotton crop moves to a market outside the South. The supply of the manufactured merchandise and package goods comes from the North. In both the South and West, therefore, the principal business interests are concerned with distributing merchandise, or concentrating raw materials preparatory to grading and shipping. Frequently the same business men perform both functions. To secure an equalization of opportunity for the business men served, the railroads have developed rate structures which, in the concentration of raw materials and foodstuffs, are largely based upon "transit" privileges, or "in" and "out" rates, and which, in the distribution of merchandise (taking into account the jobbers' warehousing and credit service), substantially balance the sum of carload (C.L.) rates to the local jobbing center plus less than carload (L.C.L.) rates outbound against long haul L.C.L. rates. This short haul business, reaching the consumer through retail channels, ordinarily moves on class rates which are built on the principle that rates should increase with distance. This means that there will always be some territory (that nearby) which is peculiarly allied to a particular jobbing point. At a distance, especially when other lines of railroad serve competing distributors in other cities, equalization both of "in" and "out" rates usually results.

The freight rate, it must be remembered, is one item of cost of production and marketing which is generally known. For coal, brick, lumber, grain, and the whole list of "low grade" commodities, it is, moreover, a large element in determining the source of supply which will serve a consuming market. The competition is keen, both as between local and distant sources of supply, and as between possible substitutes in satisfying the same demand. Brick competes with lumber, stone, cement, and terra cotta, and which building material is used depends ultimately upon an analysis in which the cost of transportation from alternate sources of supply is a significant element. In the jobbing business, the relative freight rate is equally important

because the trading is done on a narrow margin of profit. An apparently insignificant difference in freight rates may determine which wholesaler does business at a profit, just as it may determine which flour mill operates, or which iron furnace is "in blast," which mine is worked, or the extent of intensive cultivation on a farm. Always the business man—and the farmer, mine operator, or lumber man is as much business man as is manufacturer or trader—must scan the table of freight rates paid by competitors, as compared with his own.

It is the issue of "local" discrimination, then, which has been very generally raised before the Interstate Commerce Commission, where rate readjustments, as distinguished from classification readjustments, have been sought. From the nature of the case, the reasonableness of rates is extremely difficult to measure. But local discrimination can be tested by the simple yardstick of distance, and at least a *prima facie* case made upon this basis. The Interstate Commerce Act does not, it must be remembered, condemn all discriminations between business men in different sections or towns. It condemns only such discriminations as are undue.[1] When the conditions governing the transportation service are substantially similar, there is at least a presumption in favor of equalization; where these conditions are substantially dissimilar, the differences in rates should measure, as accurately as may be, the differences in circumstances.[2] Otherwise undue preference or discrimination must result.

§ 2. The competition of railroads connecting common terminals, but diverging from each other for a considerable distance presents the equalization of rates under the simplest competitive conditions.

[1] "It is not all discriminations or preferences that fall within the inhibition of the statute; only such as are unjust or unreasonable." Interstate Commerce Commission *v.* B. & O. R.R. Co., 145 U. S. 263, 276.

[2] "Any discrimination which exists must not exceed that which is warranted by the differences in the circumstances and conditions of the haul." Chattanooga Packet Co. *v.* I. C. R. R. Co., 33 I. C. C. 384, 392, citing Sondheimer Co. *v.* I. C. R. R. Co., 17 I. C. C. 60. In City of Astoria *v.* S. P. & S. Ry. Co., 38 I. C. C. 16, 24, the Commission said: "when the general conditions of transportation and the general circumstances surrounding traffic are substantially similar and such a rate relationship adversely affects the commerce of one point and thereby materially benefits the commerce of the other point . . . it may be said to involve the preferences and discriminations prohibited by law as between different communities served by the same carriers."

Between A and B all roads giving the same class of service must charge the same rates if all are to participate in the business. This is a straight case of railroad competition. If the railroads B-E and A-D establish a route via C, they cannot participate in the competitive business except on the basis of the rates via the direct lines. If service is poorer, shipments may be attracted by charging less than the direct lines (establishing rates on a "differential" basis); but more cannot be charged. If, to "hold

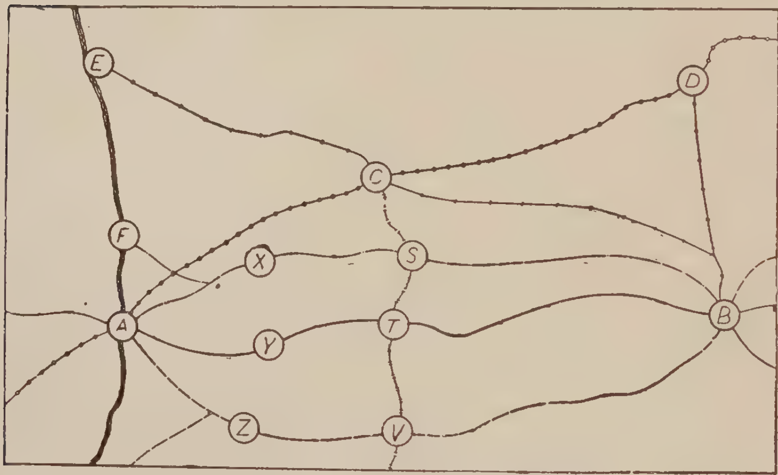


PLATE 1.—Equalization and Competition.

up" intermediate rates on circuitous routes, a higher rate is published between common terminals, the publication is a mere technical compliance with the law. The Chicago-Cincinnati lines publish such rates on New Orleans business, but they are really out of the market and solicit no traffic. On both passenger and freight business there are so-called "differential" or sub-standard lines, giving slower service, and, in the passenger traffic, service less luxurious. Between Chicago and the Seaboard, the Canadian lines operate on a differential basis, and the roads which are essentially "freight roads" such as the Erie and the Nickel Plate tempt traffic by a differential passenger charge.

There was the time when railroads cut the rates at competitive points, such as A and B, "holding up" the rates at intermediate

points.[1] This was a violation of another fundamental principle of rate making: the long and short haul rule. But there no longer may be deviations from this rule in the case of parallel railroad competitors, as distinguished from circuitous railroad competitors, since the rate between the terminals is set by mutual agreement, and no one line controls the situation.[2]

The fact that the northernmost of the direct lines serves point F as well as point A will ordinarily call for equalization of the rate at F and A in the absence of controlling reason to the contrary. The distance between B and F and B and A is substantially the same, and, if the carrier sought to charge business men in F higher rates than were charged their competitors at A, a complaint of discrimination would be well founded. In anticipation of such complaint the railroad would, ordinarily, effect equalization of such rates at F and A. This reasoning accounts for the rate equalization at the various Missouri River crossings: Kansas City, Leavenworth, St. Joseph, Omaha, Sioux City.[3]

§ 3. Competition will also create a substantial equalization at the "cross country" competitive points such as X, Y, and Z.[4] This force is especially strong in agricultural or ranch country. If, in a range territory, for example, a lower cattle rate applied from X to B, the primary market, ranch men would drive their cattle to X from distances more than half-way between X and Y. They would make their purchases at the stores in X and business

[1] See the discussion of A. B. Stickney, *The Railway Problem*, p. 50 and following, accounting for the Chicago-St. Paul and Chicago-Missouri River rates, lower than rates at intermediate points, and for a later day discussion, Wisconsin Rate Cases, 44 I. C. C. 602. Through rates to and from the East at points intermediate to Pueblo and Salt Lake City on the Denver & Rio Grande were formerly on the Pueblo combination, which, because of the high level of local rates on the Denver & Rio Grande, exceeded the Salt Lake rates set by the Union Pacific. On complaint of the Grand Junction interests, the Commission denied the D. & R. G. permission to charge more to Grand Junction on westbound traffic from the East than the rates effective at more distant points. Although the through rates are still calculated on the Pueblo combination, the Salt Lake rates are carried as maxima. The first class rate from Chicago now blankets as far east as Nathrop, Colorado, 512 miles from Salt Lake, as indicated on the diagram below, Plate 13. Chamber of Commerce of Grand Junction *v.* D. & R. G. Ry. Co., 23 I. C. C. 115.

[2] See the extended discussion below, Chapter XI.

[3] Daniels *v.* C. R. I. & P. Ry. Co., 6 I. C. C. 458. In this case the Commission held that "approximate justice" would be secured by limiting Chicago-Sioux Falls rates to 104 per cent of the Chicago-Sioux City rates, the present-day adjustment.

[4] Knoxville *v.* C. N. O. & T. P. Ry. Co., 37 I. C. C. 687, 690.

men at Y would find their "natural" territory invaded. The railroad serving Y would, moreover, lose both cattle revenue, and the revenue from the high class merchandise distributed through the local Y merchants. The result of the competition would be an enforced equalization of the cattle rates at Y. An attempt to lower the rates at X once more would provoke another cut, a process, which, if sustained, would mean a rate war. Exactly the same reasoning accounts for an equalization at Z; the argument would be equally valid if the commodity were cotton, lumber, wool or grain instead of cattle, or if the inbound rates on merchandise were the ones "out of line," permitting the merchants at one of the competing towns to "shade" prices. Only when a considerable distance or mountain country prevents the operation of the business competition (as distinguished from the railroad competition) can the "cross country" rates on parallel lines connecting common terminals fail substantially to equalize.[1] The universal grading back across Iowa of the through rate from Chicago to Omaha illustrates the operation of this principle. So do the Montana groups as carried by the three parallel competitors, the Great Northern, Northern Pacific and St. Paul.[2] The higher level of rates on the Rio Grande as compared with the Union Pacific is possible only because of the mountain barrier. There can be no "cross country" competition at points between Denver and Salt Lake of such importance as to enter into the practical problems of rate adjustment.[3]

[1] Cases involving "cross country" competition as an issue have seldom come to the Commission because of the impelling force of the competition, and because a railroad cannot be held to discriminate merely because it refuses to "meet" rates set by competitors. A case which illustrates the competitive relationship very well was occasioned by the character of the competition of the C. B. & Q., Rock Island and Union Pacific in Western Nebraska. The issue was whether a carrier operating two parallel lines of road serving the same territory, one a main line, and another a branch, was justified in maintaining rates not shown to be unreasonable *per se* on the branch line while maintaining materially lower rates on the main line for like distances to meet the cross country competition of an independent parallel railroad. The Commission, citing Planters Gin & Compress Co. *v.* Y. & M. V. R. R. Co., 16 I. C. C. 131, 133, upheld the discrimination as not unjust because of the dissimilarity of circumstances. Neb. Ry. Com. *v.* C. B. & Q. R. R. Co., 36 I. C. C. 219, 221.

[2] R. R. Com. of Montana *v.* B. A. & P. Ry. Co., 31 I. C. C. 641, 648.

[3] Chamber of Commerce of Grand Junction *v.* D. & R. G. Ry. Co., 23 I. C. C. 115.

In Dewey Bros. *v.* P. C. C. & St. L. Ry. Co., 46 I. C. C. 388, 393, the Commission discussed a similar situation in the East, remarking upon the

The competitive relations of the principal jobbing centers on the Missouri River, which draw their stocks largely from the east, illustrate the workings of the equalization principle at points which compete in the same area. Obviously, the North Western and Illinois Central are tied up with the Omaha business men; the Santa Fé and the Alton with Kansas City competitors. Such lines as the Burlington, Rock Island, St. Paul, Wabash, Chicago Great Western and Missouri Pacific are in position to serve both cities. And, in order that the business men of the two cities can sell on equal terms in the highly competitive territory in the western parts of Kansas and Nebraska, in Colorado and Wyoming, the railroad serving each city "protects" the mutual interests, by equalizing the rates. Local rates between the Mississippi River crossings and the Missouri River crossings are, therefore, in general, the same, although the greater distances between Sioux City and Sioux Falls and the lower Mississippi River crossings result in slightly higher adjustments. These equalizations between the river crossings are shown on the following map: Plate 2.

A similar adjustment exists between Chicago rate points and the Missouri River crossings, and between Peoria rate points and the river; the rates equalize at all the Missouri River crossings. The Peoria rate scales "split the difference" between the Chicago and St. Louis rates. Since rates to and from points east of the Indiana-Illinois state line are usually "made" on the Mississippi River combination, the equalization is generally effective on the great volume of in and out traffic at the rivers. The same essential geographical and competitive relationships are apparent in Colorado, and account for the common point group extending along the base of the mountains from Cheyenne to Trinidad, and on the Pacific Coast where, at Seattle, Portland, San Francisco, Los Angeles, and San Diego, the terminal

difference in the competitive situation between the Chesapeake & Ohio and Norfolk & Western, east and west of Roanoke. West of Roanoke "cross country competition and the fact that defendant's line in this section is intersected frequently by other lines" had made it necessary in 1890 to reduce the through Cincinnati rates to the C. & O. basis. This blanketed the Norfolk (Virginia Cities) rates to the base of the mountains. Previously the N. & W. had charged more at intermediate points than at Norfolk. West of Roanoke a mountain range separates the two valleys in which the two roads operate. The wagon roads follow the valleys, and there is, therefore, no possibility of cross country competition.

port rates equalize. They account also for the equalizations of the South Atlantic and Gulf port rates. Car ferry competition accounts for the equalization of westbank Lake Michigan ports with Chicago.[1]

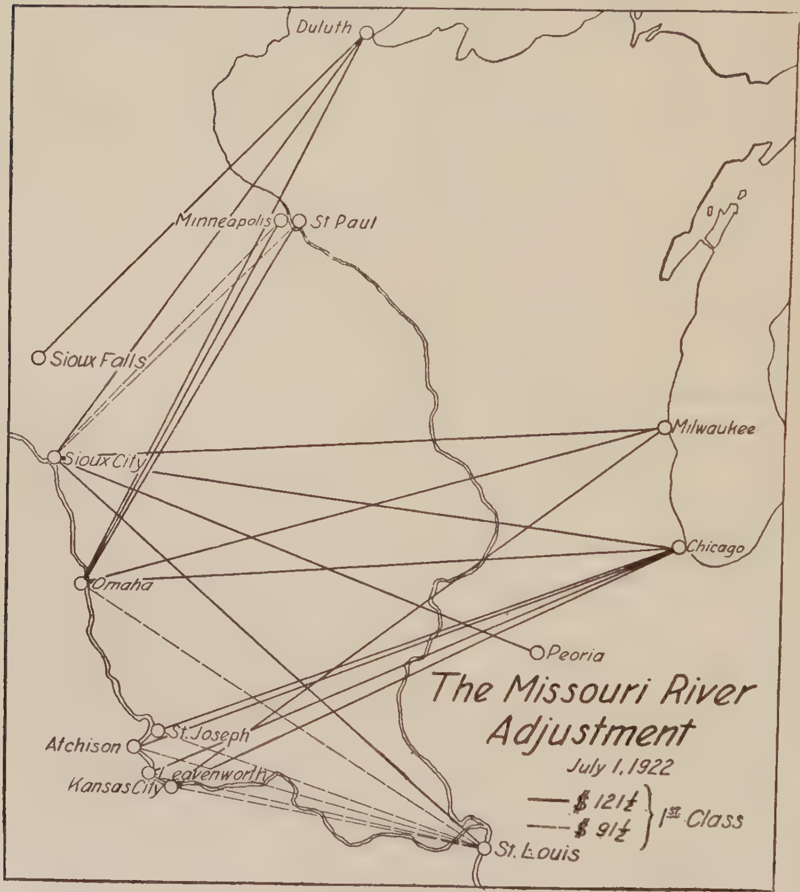


PLATE 2.

§ 4. When the "in" rates are equalized because of the competitive interests of different carriers in the business men of the towns which they serve, this same interest seeks also to equalize the outbound adjustment in order that the business may not be

[1] Wisconsin Rate Cases, 44 I. C. C. 602, 636. See Plate 17.

diverted to the competitive railroad (and the business men it serves) because of a lower total rate, f.o.b. the consuming point. This is especially true of the high class freight hauled to "jobbing centers" and there distributed. Because of cross country competition, this competitive interest even extends to the points local to a single railroad leading from one of two (or more) competing jobbing points which have the same basis of inbound rates. Where the competition in the destination territory is slight, the tendency is slowed down.[1] Still the railroads serving Denver have maintained for their Denver customers the same basis of rates into Southern and Western Colorado as the Pueblo jobbers enjoy, although the haul is 119 miles longer, and over the Palmer Lake divide.[2] Rates from Duluth and the Twin Cities equalize in the territory west in Dakota, but at points intermediate, rates are built up to give the Duluth dealer an advantage where distance is less, and to give the Twin City dealer similar advantage when the territory is closer to Minneapolis and St. Paul. To points in Nebraska where the outbound rates from the Missouri River crossings are built up on the "Clark scale," there is territory which a jobber in each of the Missouri River cities can reach on a more advantageous basis than his competitors. This is his nearby or "natural" territory.[3]

[1] The struggle of jobbing cities west of the Missouri River with the Missouri River cities,—Lincoln and Grand Island with Omaha; Topeka, Hutchinson, and Wichita with Kansas City,—the cities farther west seeking to secure a combination of rates to points beyond, equalizing the Missouri River combination, is illustrated by the Commission's opinions: Hutchinson Traffic Bureau *v.* C. R. I. & P. Ry. Co., 43 I. C. C. 689; Wichita Wholesale Furniture Co. *v.* A. T. & S. F. Ry. Co., 44 I. C. C. 339. In the latter case the Commission said: "The question of rates to and from jobbing points has been and is continually being pressed upon our attention by complaining shippers. The desire of jobbers located at various points is to have rates into and out of their particular points equalized, so that through rates to consuming territories shall be the same, no matter through which point the traffic moves. It is well settled that undue prejudice and disadvantage against a distributing point cannot be predicated merely upon the fact that the combination of inbound and outbound rates exceeds the combination available via a competitive distributing point." See also Rates on Knitting Factory Products, 25 I. C. C. 634, 639; Mobridge Grocery Co. *v.* C. M. & St. P. Ry. Co., 52 I. C. C. 307, and Ft. Dodge Com'l Club *v.* Director General, 60 I. C. C. 224.

[2] Pueblo Commerce Club *v.* D. & R. G. Ry. Co., 31 I. C. C. 133. The controversy was reopened by complaint from Pueblo interests, during the summer, 1922.

[3] Missouri River—Nebraska Cases, 40 I. C. C. 201. See also Astoria *v.* S. P. & S. Ry. Co., for a requirement of equalization on outbound shipments, 38 I. C. C. 16.

§ 5. The Shreveport controversy illustrates another phase of the equalization problem. The competition of Shreveport interests was with business enterprises in Dallas and Houston. The three cities are the points of a triangle. In this case the inbound rates did not equalize, and Shreveport distributors, in general, placed goods in their warehouses at lower rates than the jobbers in Texas who paid "Texas Common Point" rates. But whatever advantage accrued by virtue of this more favorable adjustment was eaten up by a higher level of outbound rates. Goods moving from Dallas or Houston toward Shreveport paid rates based upon the Texas intrastate scale, and the Texas classification, which had both been established for the purpose of fostering Texas jobbing interests. This intrastate scale was considerably lower than the interstate scale applicable westbound. A rate of 60 cents carried first class traffic 160 miles east from Dallas, while the same rate carried the same class of traffic only 55 miles into Texas from Shreveport. The first class rate from Houston to Lufkin, Texas, 118.2 miles, was 50 cents per 100 pounds, while the rate from Shreveport to Marshall, 42 miles, was 56 cents. The rate on furniture from Dallas to Longview. 124 miles, was 24.8 cents, and from Shreveport to Longview, 65.7 miles, was 35 cents. These instances illustrate the general character of the rate adjustment. At first the effect of the orders of the Interstate Commerce Commission was confined to the establishment of mileage scales of rates upon the same basis toward Shreveport and from Shreveport. Later the "Shreveport Scale" became the basis of a general readjustment of the Texas intrastate rates.[1] The result of thus equalizing the outbound rates has been to give the Shreveport business men a net advantage. The Commission has insisted that any advantages which accrue to Shreveport because of its proximity to the Mississippi River, and its location on the Red River, may not be nullified by a discriminatory level of outbound rates.

§ 6. Equalization also appears in the establishment of the same rates from important business centers on the Mississippi and Missouri Rivers to jobbing centers in the West. At the Butte-Helena-Anaconda group (Montana Common Points) the

[1] See R. R. Com. of La. *v.* A. H. T. Ry. Co., 48 I. C. C. 312 and the cases cited. The first class rates are diagrammed, Plate 6.

rates from Chicago equalize with those from St. Louis, and rates from Duluth and St. Paul with those from the Missouri River cities. The market is common fighting ground. Formerly equal rates upon the Missouri River basis applied from San Francisco and Los Angeles, and there was the time that the same rates applied also from the North Pacific ports: Seattle, Tacoma and Portland.[1] The latter, however, were able to secure a lower basis of rates by convincing the Commission that, on the basis of mileage, they were entitled to get into the field on a more favorable basis than their competitors.[2] In the days before the war Atlanta was also the hub of a wheel. It took the same class rate scales from New Orleans and the Mississippi River towns south of Memphis, from the Ohio River crossings, and from Baltimore, via the rail and water lines. This equalization was broken down when, in war time, the rail and water rates were advanced without a change in the Ohio River scales.

The relationships of the scales of class rates effective at Butte and Salt Lake City reflect the importance of the competitive relationships of business men in those cities. In 1910 the Commission had established rates between Salt Lake City and Eastern points, considerably lower than the rates then in effect:

	Class	*1*	*2*	*3*	*4*	*5*
Chicago	(old)	285	240	198	160	133
	(new)	245	207	172	139	115
Mississippi River	(old)	265	220	188	155	128
	(new)	227	789	163	134	111
Missouri River	(old)	205	175	153	128	106
	(new)	190	162	142	119	98

In 1914 the railroads proposed, and the Commission approved, advances in these scales as follows:

Class	*1*	*2*	*3*	*4*	*5*
Chicago	265	223	185	149	121
Mississippi River	247	205	177	143	116
Missouri River	200	170	150	126	100

The scales were built up from the Chicago-Butte first class rates, \$2.65, by deducting 65 cents, the then difference between the Chicago-Colorado Common point rates, \$1.80, and the Missouri River-Colorado Common point rates, \$1.15, to secure the

[1] Minnesota Rate Cases, 230 U. S. 352, 386.
[2] Portland Chamber of Commerce *v.* O. R. R. & N. Co., 21 I. C. C. 640.

Missouri River-Utah rate of $2. The lower classes were "logically" calculated in accordance with a fixed percentage relationship:

1	2	3	4	5
100	85	75	65	50

The result was the Missouri River-Salt Lake scale. The Mississippi River and Chicago scales were then fixed by adding the differentials as set by the Commission for Colorado;[1] providing that the Montana rates should not be exceeded. Peoria rates, again, were set midway between Chicago and the Mississippi River rates; St. Paul rates were placed upon the Mississippi River basis; and Chicago rates were applied at Duluth and Memphis. The rates thus established have been modified by the various changes in rate levels—but the Chicago-Salt Lake and Chicago-Butte first class rates still equalize.[2]

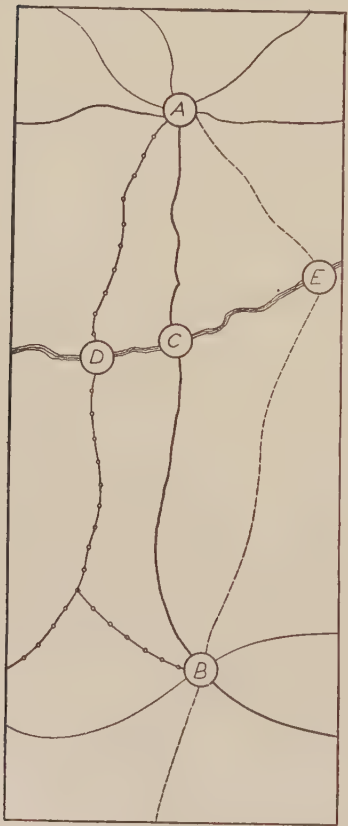


Plate 3.—Gateway Equalization.

§ 7. The equalization principle also accounts for the establishment of the same rates at "rate breaking" points in order that through rates made up of a combination of rates may equalize. The essential relationships can be presented diagrammatically.

If rates from A to B are not published through, but are made on a combination basis, the rates

[1]

	1	2	3	4	5
Mississippi River	47	35	27	20-½	16
Chicago	65	53	36	25	20

Class and Commodity Rates to Salt Lake, 32 I. C. C. 551.

[2] See diagram, below, Plate 13.

from A to C plus the rates from C to B fix the total rate which may be charged by any competitive lines. The lines via D and E must meet this rate or retire from the through business. If the rates for the corresponding portions of the service are the same, the problem is not essentially different from that presented when through rates equalize via all routes. Indeed, if the A-D or D-B rates (or both) exceed the A-C and C-B rates, equalization can only be effected by establishing through rates by all routes, or by establishing rates between A and D lower than the local A-D rates, and applicable only on business to or from B: "proportional rates."[1] "Gateway competition," this might well be called, because it equalizes rates via competing gateways.

Before the series of Commission orders in the Mississippi River Cases, the local rates between New York and the crossings, St. Louis to Quincy, were upon the basis of 117 per cent of the New York-Chicago rates, while the rates at the "upper crossings," Keokuk to Dubuque, were on higher bases. On business moving to or from points west of the Mississippi, the St. Louis rates were applied as "proportional rates" at the other crossings. The equalization of the rates at all Mississippi River crossings on the 117 per cent basis—the result of a series of Commission opinions, in which distance received much consideration,—has made unnecessary the publication of special propor-

[1] Thus proportional rates may be defined as rates, applying to a part of a through journey, which differ from the corresponding local rates and apply only on traffic from beyond, or for beyond. Let the situation be made concrete; assume that the first class rate from A to C is 10 cents, to D 11 cents, to E 14 cents, from D, C, and E to B is 12 cents. The through rate A to B via C is 22 cents, and the lines via D and E can secure no more than this and participate in the business. They have two alternatives: (1) to withdraw from the business, or (2) to shrink their rates to D and E so that on business destined to A, the combination rates equalize. If, in shrinking their revenues, they do not desire, for revenue reasons, to apply the 10 cent A–C rate locally, they can continue in effect the local rates A–D 11 cents, A–E 14 cents, and publish the 10 cent rate as a proportional rate, applicable only on the part of the through journey over their lines. Rates from A to B via all routes are thus made to equalize. If the rates from A to C, D, and E equalized, and were different from C, D, and E to B, the proportional basis would then be necessary on the lines meeting at B. Conceivably there might be a situation involving a combination of proportional rates. See Kansas City Transportation Bureau *v.* A. T. & S. F. Ry. Co., 16 I. C. C. 195; Board of Trade of Kansas City *v.* St. L.—S. F. Ry. Co., 32 I. C. C. 297; Proportional Rates to Ohio River Crossings, 43 I. C. C. 458; Increased Rates, 1920, 58 I. C. C. 220, 252-3.

tional rates from or to points east of Pittsburgh and Buffalo [1] The rates are the same whether the shipment moves to St. Louis, Quincy, or Dubuque, locally, or is destined beyond. There are "proportional" rates in effect between Iowa points and the river, and westbound to the Missouri River crossings.[2] East-

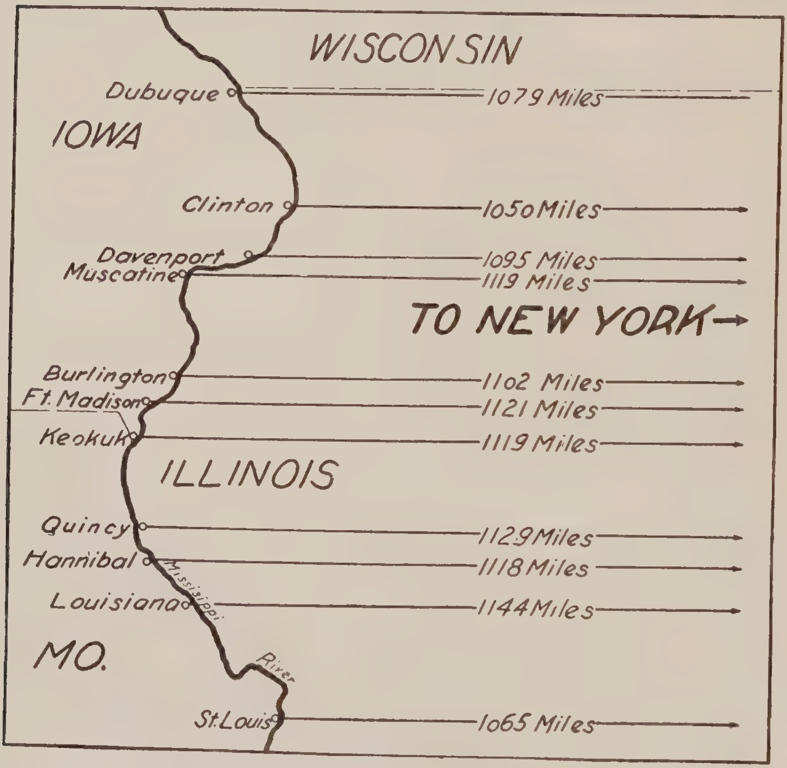


PLATE 4.—Mississippi River Crossings.

bound the local rates still apply in calculating the combination rates effective. On business originating at, or destined to, points in Indiana and Ohio, it is sometimes necessary to publish propor-

[1] Mississippi River Case, 28 I. C. C. 47; 29 I. C. C. 530; Class and Commodity Rates to and from Quincy, 32 I. C. C. 471, 33 I. C. C. 409; Chamber of Commerce of Freeport *v.* C. M. & St. P. Ry. Co., 33 I. C. C. 673.

[2] The present scale is that set by the Commission in Warnock *v.* C. & N. W. Ry. Co., 21 I. C. C. 546, and adjusted with changes in the general rate level.

tional rates, equalizing the rates at all Mississippi River crossings.[1]

Other proportional rates to effect equalizations of through rates apply in connection with the through rates to Butte from the Seaboard. The rates from the Missouri River Crossings to Butte are the same as the rates from the Twin Cities to Butte. But the rates from New York and the Eastern Territory, east of Buffalo, Pittsburgh, and Huntington (Trunk Line Territory) to Kansas City or Omaha are higher than the rates to St. Paul and Minneapolis. The competition of the Great Lakes route has caused the establishment of a special scale of westbound class rates to the Twin Cities.[2] In order that the lines operating via the Missouri River may compete with the Northern routes on Butte business, the tariffs provide that the special scale of rates applying to St. Paul, shall be used as proportional rates to the Missouri River on business destined to Butte. Upon the same principle, rates from St. Louis to Texas are made applicable at the upper Mississippi crossings, diverting traffic to the northern crossings and the Kansas City gateway and route.

§ 8. A logical extension of the principle of proportional rates explains the "port differentials" problem which has so often been the subject of controversy. The "port differentials" establish the rate relationships of the principal North Atlantic ports on business to and from the West on both domestic and foreign business. The fundamental economic relationships are admirably explained in Albert Fink's report of 1881: the railroad forms only one part of a through route, the water carrier across the Atlantic being the other. The through rate between an interior point and England—say, on grain from Chicago to Liverpool—must equalize, whether the traffic moves through New York, Philadelphia or Baltimore. The "legitimate inference" from Mr. Fink's argument was pointed out by President Hadley: the port differentials ought exactly to counterbalance any differences in

[1] R. R. Com. of Iowa *v.* A. A. R. R. Co., 46 I. C. C. 20; Interior Iowa Cases, 46 I. C. C. 39; North Iowa Traffic Asso. *v.* Director General, 58 I. C. C. 491.

[2] These are governed by the Official Classification; for their history, see Burnham-Hanna-Munger Dry Goods Co. *v.* C. R. I. & P. Ry. Co., 14 I. C. C. 299; Traffic Bureau, La Crosse, *v.* A. A. R. R. Co., 61 I. C. C. 289. There is an excellent discussion of the Peoria gateway equalization problem in Iowa *v.* B. & O. R. R. Co., 46 I. C. C. 595.

cost of ocean carriage.[1] Exactly this they have aimed to do. Better harbor facilities, a shorter ocean journey, and more established import houses resulted in bringing more ships to New York, than to Philadelphia or Baltimore. Lower inbound rates could be charged. The competition of the larger supply of ships for the export business—especially grain traffic—brought about lower outbound rates at New York than at the other points. A higher rail charge could, therefore, be assessed to New York, from the grain markets of the West. The differentials have persisted merely as an equalizing device. In handling the port differential situation, the Interstate Commerce Commission has resorted to the distance principle to justify the lower bases of rates at Philadelphia and Baltimore.[2] But it may well be contended that the governing principle is not the distance principle, but the equalization principle.

There are other considerations important at the Pacific ports. The competition is not only a competition of the carriers serving Seattle, Portland or San Francisco, but a competition with the carriers serving the Atlantic ports. Business between Chicago and the Orient may move across the Pacific or through the Suez Canal.[3] The railroads are likewise in competition with the

[1] *Railroad Transportation*, p. 97. Mr. Fink's report, the original differential agreement, and the advisory report of Messrs. Thurman, Washburne, and Cooley (1882), together with the various pertinent opinions of the Interstate Commerce Commission have been collected in Mr. John B. Daish's *Atlantic Port Differentials.* A clean-cut discussion is found in Mr. Edgar J. Rich's brief, reprinted in Senate (Elkins) Committee Hearings (1904-5), Vol. V, pp. 407-422.

[2] Chamber of Commerce of New York *v.* N. Y. C. & H. R. R. R. Co., 24 I. C. C. 55, 674; 27 I. C. C. 238; In re Import Rates, 24 I. C. C. 78, 678, 27 I. C. C. 245, building upon In re Differential Freight Rates, 11 I. C. C. 13.

New York rates are the base rates. Westbound Boston rates are the same as New York; eastbound class rates are 7, 6, 5, 4, 3, 2 cents over New York; domestic grain rates are 2 cents over New York; the Philadelphia westbound rates are 6, 6, 2, 2, 2, 2 cents under New York; Baltimore class rates 8, 8, 3, 3, 3, 3 cents under New York; eastbound class rate differentials are: Philadelphia, 2 cents under New York on all classes; Baltimore 3 cents. On export flour, Philadelphia is 1 cent under New York, Baltimore 2 cents under New York; on export grain, Philadelphia is 1 cent under New York, Baltimore 1½ cents; on export grain products, Philadelphia rates are 2 cents under New York, Baltimore 3 cents under. These adjustments are typical of the entire rate structure.

[3] Early in 1922, R. M. Calkins, Vice-President of the St. Paul, said: "It should be understood that 80 per cent of the oriental traffic arriving at Seattle is destined to points east of Chicago, a heavy percentage to New York. Any change in present arrangements would mean merely then any

Panama Canal route. Rates applicable via either route must be the same, or the differentials must equalize service conditions. This necessity to equalize the rates accounts for rates on import or export business lower than on domestic business.[1] The through routes, on which the rates must equalize, are composed of ocean lines between the ports, and the rail lines leading into the interior. Similar competitive relationships govern the grain rates from western fields to the Gulf ports in competition with the North Atlantic ports.[2]

§ 9. The transit privilege represents a special case of equalization: an equalization of business competitors located at different points on the route of the flow of supplies, usually raw materials, originating in a common producing area and sold in a common market. The scheme had its origin in the grain and milling trade.[3] Railroads sought to diversify their traffic and to build up towns whose traffic they could control exclusively. Because, as a general rule, a through rate is less than a combination of locals, unless the through rate is figured on the combination of locals, the only points which could economically compete in a common market beyond would be (1) those located at the point of origin of supplies (if sufficient were available), (2) the business centers close to the dense consuming market, or (3) intermediate rate breaking points, the "in" rates to which and the "out" rate from which constituted the lawfully published through rates. It was especially important for the companies serving the grain fields, and the first set of primary markets, notably the Missouri River Crossings and the Twin Cities, and having lines extending to Chicago, to control the movement of traffic to their Eastern terminal. Grain moving to the river crossings, where the rate "broke," or to Minneapolis, and there milled, was business to be

business we now receive and give to the Japanese line would, instead of going to Seattle, be routed to New York by way of the Panama Canal, cutting out all roads in the United States and benefits that would accrue."

[1] Such rates were held legal, as not in violation of Section 2 of the Act, in Texas & Pacific Ry. Co. *v.* I. C. C., The Import Rate Case, 162 U. S. 197. For a discussion of import and export rates with maps and detailed tables, see *Preferential Transportation Rates*, United States Tariff Commission, 1922.

[2] Mayor & City Council of Wichita *v.* A. T. & S. F. Ry. Co., 9 I. C. C. 534; Rates from New Orleans and Galveston, 44 I. C. C. 727.

[3] In Duncan *v.* N. C. & St. L. Ry. Co., 35 I. C. C. 477, 482, the date of the first transit privilege is shown as 1870, the place, Nashville. See also U. S. *v.* L. & N. R. R. Co., 235 U. S. 314.

fought for with those lines which extended from those primary markets to Chicago. The transit scheme was evolved to control the movement beyond the milling point. By collecting the full local rate in, and charging only the balance of the through rate out, the carrier could very largely control the routing for the full extent of its rails.[1] Other towns intermediate, where "in" and "out" rates exceeded the through rate, would be shut out of any business except that in their immediate neighborhood. In the grain trade, and the milling business, this would have meant concentration of the industry at the "rate breaking" points, especially at the Twin Cities, the Missouri River Crossings, Chicago and St. Louis, where competition for the outbound traffic would be especially keen.[2] By the fiction that the movement of wheat from the wheat field, moving into a non-rate-breaking point, and there milled into flour, to be shipped to or through the rate breaking point, was a single transaction from the point of origin to the point of destination, the intermediate milling point was placed in position to compete in the common market. The multitude of small mills scattered through the grain growing states, some serving local needs largely, and marketing only a surplus, marks the result of this policy of the railroads.

The basis of the competitive extension of the transit privilege is well illustrated by practice in the fabrication of steel into bridge materials and structural steel. In 1908 and 1909, the Wheeling & Lake Erie established a fabricating-in-transit privilege at Toledo and Canton, Ohio. On structural steel moving to Detroit, this substituted the through rate from Pittsburgh, instead of the Toledo combination, placing Toledo steel fabricating plants in position to compete with plants in the Pittsburgh district. A charge for the privilege was made which equalized the switching costs in the Pittsburgh district. The action of the W. & L. E. was met at Toledo by the Lake Shore, which, to avoid a piling up of complaints alleging discrimination, next extended the privilege to plants at Cleveland, Buffalo, and Elkhart, Indiana. The Big Four added Indianapolis, the Pan Handle (Pennsylvania), Muncie—and their action was followed by the B. & O. and Erie. In less than six months after the Wheeling

[1] Mixed Car Dealers Asso. *v.* D. L. & W. Ry. Co., 33 I. C. C. 133, 147.
[2] Royal Milling Co. *v.* G. N. Ry. Co., 47 I. C. C. 263, 265, 266.

& Lake Erie began the process, the fabrication in transit privilege had been generally extended to points in Ohio and Indiana.[1]

The Interstate Commerce Commission originally urged that the Act did not sanction an arrangement of this kind.[2] But consideration of public policy, since the practice broadened the scope of competition, and recognition of the fact that abrogation of privileges long extended could render valueless, or less valuable, industrial plants constructed upon the faith of their continuance, have resulted in a reversal of attitude. It has been further recognized that an extension of a transit arrangement may eliminate discrimination. Yet the working rule is an extremely conservative one, however clearly stated: "The general policy of the Commission is not to require the establishment or extension of transit except where necessary to remove discrimination."[3] Transit privileges the carriers may extend, but such privileges they will not be required to extend unless an extension of the privilege is a necessary part of carrying out one of the Commission's responsibilities.[4] The reason for this attitude toward transit lies in the possibilities for departures from the published rates through the substitution of tonnage and the difficulty of policing the records.[5] But when the issue of discrimination has been squarely presented, the Commission has not hesitated to direct the extension of the privilege to remove the discrimination.[6]

[1] Fabrication in Transit Charges, 29 I. C. C. 70, 74, citing Ottumwa Bridge Co. *v.* C. M. & St. P. Ry. Co., 14 I. C. C. 121, and Indianapolis Freight Bureau *v.* C. C. C. & St. L. Ry. Co., 15 I. C. C. 370, 375. In the former case it was shown that the rates in and out at each fabricating point had formerly been adjusted so that the total charge from Pittsburgh to Kansas City was always the same; the latter case was brought before the transit privilege had been extended to Indianapolis. The Indianapolis interests showed that their rates were 7½ cents per 100 pounds in excess of the Chicago combination to Kansas City, 10½ cents above Chicago to the Twin Cities, and 5 cents over St. Louis. Extension of the transit privilege before action of the Commission removed the basis of complaint.

[2] Crews *v.* R. & D. R. R. Co., 1 I. C. C. 401.

[3] Central Y. P. Asso. *v.* V. S. & P. R. R. Co., 10 I. C. C. 193; Douglas *v.* C. R. I. & P. Ry. Co., 16 I. C. C. 232.

[4] Nat'l Casket Co. *v.* Southern Ry. Co., 31 I. C. C. 678, 697; Middletown Car Co. *v.* Penn. R. R. Co., 32 I. C. C. 185.

[5] In re Substitution of Tonnage, 18 I. C. C. 280; the Transit Cases, 24 I. C. C. 340; Fabrication-in-Transit Charges, 29 I. C. C. 70; Hoyt & Bergen Co. *v.* C. & N. W. Ry. Co., 32 I. C. C. 319, 324.

[6] Henderson Com'l Club *v.* I. C. R. R. Co., 36 I. C. C. 20, 29, citing In re Transportation of Wool, Hides & Pelts, 23 I. C. C. 151; Southern Ill. Millers Asso. *v.* L. & N. R. R. Co., 23 I. C. C. 672; Missouri River-Illinois Wheat and Flour Rates, 27 I. C. C. 286.

The voluntary action of the carriers and the exertion of this official pressure have together resulted in an extension of the transit privilege to a variety of commodities and to widely separated areas, simplifying the concentration of supplies, for storage, grading and marketing, and equalizing competitive conditions.[1]

[1] See Transit Cases, 24 I. C. C. 340; 26 I. C. C. 204; In re Manganese Ore, 25 I. C. C. 663; Concentration of Cotton in Arkansas, 29 I. C. C. 106; Reconsignment and Storage of Lumber, 27 I. C. C. 451; Norman Lumber Co. *v.* L. & N. R. R. Co., 29 I. C. C. 565; In re Advances on Live Stock, 22 I. C. C. 160, 174; Hood & Sons *v.* B. & M. R. R., 49 I. C. C. 694. The last case has to do with a transit privilege for pasteurizing milk.

CHAPTER X

THE DISTANCE PRINCIPLE

§ 1. The distance which goods or passengers are transported measures railroad service. Passenger rates are almost exclusively built upon the principle that rates should increase with distance. The mile transported is the unit of charge. Non-competitive freight rates are usually established in general conformity to the same principle; competitive freights may be. Not only is the service performed greater, but the total costs incurred are greater as the distance increases. This additional service means that investment has been made in roadbed and permanent way, and that additional outlays for operating expense (the costs of way and equipment and of conducting transportation) must be incurred for its performance. It is a sound principle that the goods or persons which occasion the expense should (in so far as what the traffic will bear will permit) contribute to meeting that expense. Any other policy must throw a burden upon other users of the railroad, or upon the owners. The economic effects would be as though a subsidy had been paid. A *prima facie* case, then, can be made for rates based upon distance.[1]

§ 2. The publication of rates based upon increases in exact proportion to distance is typical of the passenger rate structure over the whole country. In the more thickly populated sections, where the "density of passenger traffic" (the number of passengers transported one mile, per mile of line) is heavy, the rate per passenger mile is usually lower than in the more thinly populated West. Where, as is the case of the narrow gauge lines of the

[1] Green Bay Business Men's Asso. *v.* B. & O. R. R. Co., 15 I. C. C. 59, 63.

Denver & Rio Grande in southwestern Colorado, the passenger density is light, and, in addition, operating costs are high, the passenger rates are upon a higher per mile basis, in that instance 5.4 cents per mile, as compared with a 3.6 cents base rate for lines where these unfavorable conditions are not met. The individual railroad which is not exposed to competition has sometimes been permitted to charge higher rates than other lines in the same general vicinity, provided its financial situation warranted the higher level of rates. But, although the rate per passenger mile frequently is different in different sections of the country, upon different railroads in the same section, or even upon different divisions of the same system, the general method

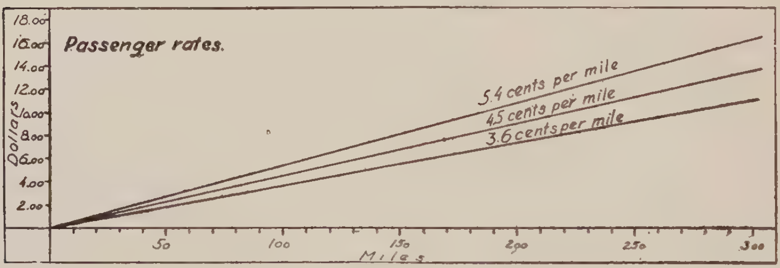


PLATE 5.

of establishing rates is the same: rates increase with distance. If distances are plotted horizontally, and charges, vertically, the rates are plotted along a straight line.

Passenger rate adjustments have ignored the distinctions between terminal and line haul costs which have been emphasized in the construction of freight rate bases. In figuring passenger rates, on which the unit of service is the passenger mile, it has been assumed that the aim of the rates, as applied to the volume of traffic, must be a total revenue from passenger business covering haulage and terminal expenses for the passenger service as a whole, and contributing to the joint costs, including return on investment. Passenger service is most expensive in crowded urban centers—notably Chicago, New York and Boston—although whether more expensive, per unit of service, in view of the heavy density of suburban traffic, it is difficult to say. Allocation of many elements of cost would at best be arbitrary. Certainly, if

the Chicago railroads had no suburban traffic to handle in their station buildings, their interlocking and signal installations, and their whole passenger terminal personnel would be both simpler and cheaper. Not a few railroad managers insist that such service is performed below the actual costs readily assignable.

§ 3. In the establishment of freight rates, on the contrary, the assumption is that each freight shipment should pay its own terminal cost. When the heavy capital expenses in passenger traffic, occasioned by terminal plant installations, are ignored, the terminal expenses assignable to passenger traffic seem small indeed. The selling of a ticket seems a simple task as compared with the completion of the necessary freight papers. Passengers load and unload themselves. Freight cars must be spotted, switched, and reswitched, and made up into trains. Expensive interchange and classification yards are necessary at important terminals. The terminal costs for less than carload freight are greater than for carload freight, since the same clerical costs are involved whether the shipment is large or small. Carload shipments, furthermore, are usually loaded by the shipper; less than carload freight must be handled through the freight house.[1] For either class of movement, moreover, these terminal costs are the same whether the shipment be for ten miles or a thousand. The "terminal" constitutes "overhead" which, being constant, regardless of the length of haul, is spread thinner and thinner per mile the greater the distance of the line haul.

Railroad accounts have not been perfected to an extent that

[1] For this reason, convenience in loading and unloading is usually not a consideration in the classification of carload freight, since this is seldom handled by the railroad employees. Less than carload freight, on the other hand, is, unless requiring specialized loading machinery, usually loaded and unloaded by the carrier. This handling cost is one of the elements necessarily taken into account in assigning a L. C. L. rating. Commodities which may be shipped "loose" in carload lots, such as pottery packed in straw, must therefore be in boxes, barrels, or crates if shipped in L. C. L. lots. The size of the package is frequently of significance; heavy, clumsy packages are penalized; thus, unframed mirror glass (L. C. L.) is rated 1st class in boxes 10–15 feet long, and not more than 7½ feet wide, whereas in boxes exceeding these dimensions the ratings are three times 1st class (3t1) in Official and Southern Territories and double 1st class (D1) in Western Territory. On carload business the ratings are the same (3d class) in Western and Southern Territories, and but slightly higher (R26 on smaller boxes as compared with 3d class) in Official Territory. For discussion of this problem in some detail, see Minimum Charges on Bulky Articles, 33 I. C. C. 378; 38 I. C. C. 257.

general figures on the subject of terminal costs are available. Some striking results have been secured by special studies undertaken in connection with problems involving, in their solution, the establishment of tables of mileage rates. But these figures applied only to particular conditions at a particular time, and are now significant only because of the relative situation which they disclose. In the Southwestern Class Rate Case of 1918, estimates varying from 13.6 cents per 100 pounds to 18.2 cents were introduced as the two terminal costs for less than carload freight.[1] In the Central Freight Association Class Scale Case (1917), figures averaging 8 to 12 cents per 100 pounds had been submitted by the Big Four, Wabash and Pennsylvania, previously selected as "typical" lines. The representative of the Chicago shipping interests, Mr. H. C. Barlow—"a man of many years' experience in traffic and transportation matters"—gave his opinion that the terminal costs on L.C.L. freight amounted to about 5 cents per 100 pounds at each end of the line.[2] Comparable data for carload freight were not available. From the point of view which seeks sound rate making principles, however, the amount of these costs is less significant than the fact of their existence.[3] They set an absolute minimum of "out of pocket" expense. The line haul expense must depend upon distance, the empty car movement, the extent to which the full pulling power of locomotives is being utilized.

§ 4. The line haul expenses tend to become less per ton mile, the greater the length of the haul. Long hauls are made in through trains, usually by locomotives pulling close to their maximum load. The costs per mile of journey are normally less

[1] 48. I. C. C. 379, 387.

[2] 45 I. C. C. 254, 271. Other significant data appear in the New England Case, 49 I. C. C. 421, 455, covering detailed investigations made by Eastern carriers in 1916.

[3] "The two factors in the construction of a distance scale are the terminal charge and the road haul charge. . . . The terminal charge at best is speculative, and no method has yet been found of exactly computing it. To determine the rate for a given distance there is added to the assumed terminal charge a certain amount to represent the road haul. Upon the rate of increase in the road haul charge for successive distances depends the level of the rates. If it be maintained that the policy of carriers should be to afford the widest possible latitude to competition which is consistent with any return short of actual loss, the proponents of a distance scale will favor a low rate of increase for unit progressions, and this will result in relatively low rates for long distances." Western Cement Rates, 48 I. C. C. 201, 233.

than the costs of short haul "local trains" the operation of which is subordinated to keeping the line open for through freight business, and for passenger traffic. Freight charges are, therefore, usually published on the "tapering" basis. Rates increase with distance, to be sure, but the rates are not plotted as a straight line, as in the passenger rate diagram, but instead as a curve which tends to flatten as distance increases. The rate per ton per mile

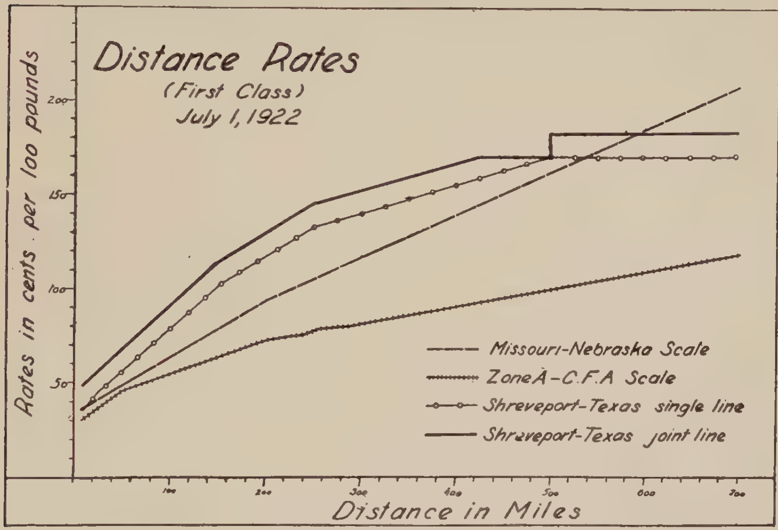


Plate 6.

becomes less with additional distance covered. The terminal overhead is also spread thinner and thinner. The typical class scales (first class rates) plotted, have been prescribed by the Interstate Commerce Commission in conformity with the "tapering" principle. They indicate the recognition by that body of the soundness of the analysis here presented.[1]

[1] "Tapering rates" were first put into systematic use by the Belgian Railway Administration, and frequently referred to as the Belgian system. The scheme is used almost exclusively in France. See C. Travis, "Railway Rates and Traffic," a translation of C. Colson, *Transports et Tarifs*. The Interstate Commerce Commission has reiterated the principle that "under like conditions freight can be profitably carried long distances at rates proportionately lower than short distances"—New Orleans Cotton Exchange *v.* C. N. O. & T. P. R. R. Co., 2 I. C. C. 375, and has referred to the "maxim" or "principle" that, "as distance increases, the earnings per ton-mile should decrease."—Boston Chamber of Commerce *v.* A. T. & S. F.

The different bases of the freight rates scales, like the different bases of the passenger rate scales, reflect conditions in the territories within which the rates were intended to apply. The C. F. A. "Zone B" scale was provided to apply in the construction of rates to and from points in Michigan north of the main line of the Michigan Central from and to points in Ohio, Indiana, and Illinois—which, with Michigan, constitute Central Freight Association Territory. From a traffic standpoint Michigan is peculiarly situated. The tonnage handled by the carriers in a large measure has its origin or destination in that state, and there is relatively little traffic passing through the state, except what has been developed by use of the car ferry to extend the lines to west bank Lake Michigan ports. Moreover, Michigan, especially that part north of the main line of the Michigan Central, is sparsely settled. The timber lands, which formerly supported the Michigan carriers, have been in large degree cut over, and have not yet been fully occupied for agricultural use. Michigan's production of the low grade staple articles, which constitute the principal sources of revenue for railroads generally, is not important. The greater cost of coal for carrier use, due to the long hauls from the mines, the greater severity of the winter weather, and the lack of trainload movements of low grade traffic operate, also, to create heavier operating costs than obtain generally in Zone A.[1] Much the same situation exists in New England. From the northern portion lumber is shipped in considerable quantities; the important railroad lines run east and west; climatic conditions are severe; fuel must be brought from a distance; no substantial amount of low grade tonnage is originated. The Commission, therefore, when faced with the problem of establishing a reasonable basis of rates in New England provided that the C. F. A. "Zone B" scale should be applied to the principal through lines, the "Class A lines," so-called, while the rates, for the branch lines, or lines of lighter traffic density ("Class B lines"), were established on a higher basis.[2]

Ry. Co., 28 I. C. C. 230, 232; Omaha Grain Exch. *v.* C. R. I. & P. Ry. Co., 53 I. C. C. 249, 266. The principle has also been referred to as "the fact that normal transportation costs decline per ton-mile the distance traversed." Capital City Oil Co. *v.* Y. & M. V. R. R. Co., 39 I. C. C. 141, 146.

[1] C. F. A. Class Scale Case, 45 I. C. C. 254, 259.

[2] Proposed Increases in New England, 49 I. C. C. 421, 451.

The same principles account for the higher levels of charges illustrated in the diagrams: they reflect relative conditions of traffic density, of distribution of traffic between the classes, or of operating costs.

If the illustration be taken from a commodity rate adjustment, the same considerations are apparent. In 1918 the Commission directed the establishment of distance rates on cement within the

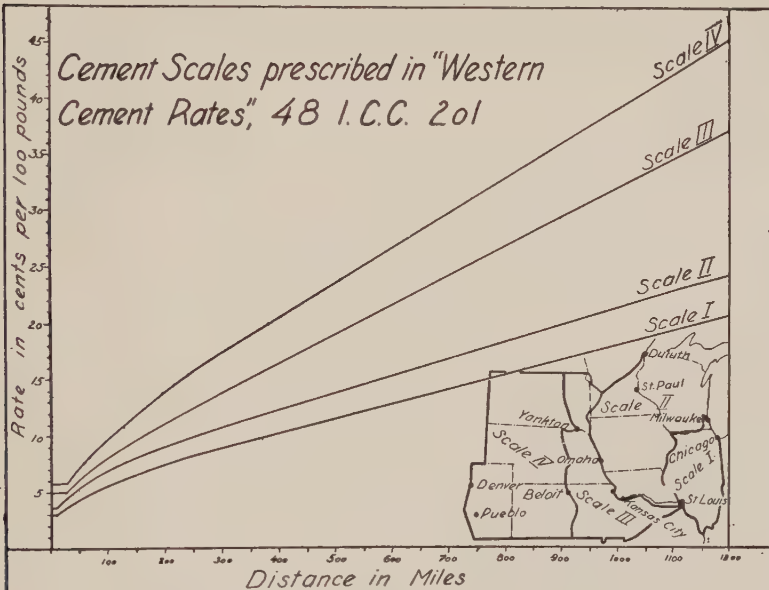


PLATE 7.

territory indicated on the map. The traffic density decreases with distance from Illinois. The rate scales to be applied within each adjustment group are plotted in the diagram. In making rates between different territories of different rate levels, it was directed that the rate for the entire distance should be calculated under each scale, and an average taken.[1] Subsequently scale territories I and II were consolidated, and Scale II applied in both.[2]

[1] Western Cement Rates, 48 I. C. C. 201, 246-248.

[2] This change was made because of the changed level of cement rates in the territory immediately east of Illinois, the result of the advance authorized in the Fifteen Per Cent Case, 45 I. C. C. 303. The competitive rela-

§ 5. In the building up of a "logical" mileage table two sets of relationships are important: the rate of increase in rates, in relation to the increase in distance, and, in the case of class rates, the percentage relationships of the rates on the different classes, *inter se*.

The rate of increase in rates has a direct relationship to the principle of charging what the traffic will bear. On any system of calculation which makes rates increase with distance, the percentage relation of the freight rate to the value of the commodity at point of origin becomes higher, the greater the distance. The ability to compete with sources of supply close to a common market becomes less. The added cost for an extra haul then becomes important as determining how small need be the increase in rate so that there is still a considerable contribution to the expense of long haul service. The cost element indicates how the railroad can afford to do what, in the interest of the development of traffic, it will seek to do. A low rate of increase per mile, or "block," results in relatively low total rates, and extends the territory in which competition can be effective. A system of making rates, such as prior to the Shreveport Cases, Texas authorities required, equalized conditions for competitors in wide territories. Rates increased with distance until a maximum of 245 miles was reached. On all hauls above 245 miles, wholly within Common Point Territory which extended, on intrastate business, from Texarkana to Amarillo, and from Brownsville to the Louisiana border, rates were upon the same basis, the rate for 245 miles. The Shreveport controversy led to the replacing of this scale by a "logical" scale.[1]

The elements of such a logical scale are well illustrated by the "Zone A" scale originally prescribed by the Commission for use in C. F. A. territory, and, as modified by the changes in rate levels, still effective. This is frequently referred to as the "Disque Scale," since originally proposed by Examiner Disque. The importance of the readjustment and its character will be the clearer if preceded by an explanation of the old C. F. A. class

tions of mills within Territories I and II were such that "little objection developed on argument to the suggested consolidation." Western Cement Rates, 52 I. C. C. 225, 228.

[1] The old Texas mileage table is reproduced, Exhibit 4, R. R. Com. of La. *v.* St. L. S. W. Ry. Co., 23 I. C. C. 31, 67.

rate adjustment condemned by the Commission as "honeycombed with inconsistencies" and superseded by the present governing scale. Before the Civil War the state of Ohio enacted a law which provided that for rail hauls of 30 miles or more within the state, the rate should not exceed 5 cents per ton per mile. That rate, under a decision of the Ohio Supreme Court, became also the maximum for distances less than 30 miles. It was applied by the Pennsylvania system, on the Cincinnati-Chicago line, and spread, through competitive forces, to the entire C. F. A. territory. Rates for 450 miles were 60 per cent of the New York-

PLATE 8.

Chicago scale—75, 65, 50, 35, 30, 25 cents per 100 pounds—or 45, 39, 30, 21, 18, 15. These rates were graded down and the rates fixed by the Ohio law were graded up until the two met. In this process it often happened that rates were not graded in accordance with any systematic scheme: frequently the first class rate was increased in 10 mile "blocks," while the lower classes remained the same. As the result of this "failure to logically progress rates" there was no general relationship between the classes. For 30 miles or under, the first, second and third class rates were the same. For distances, 95 to 120 miles, the first class rates increased for each 5-10 miles, while the second class rates remained the same. Similar discrepancies are apparent from an examination of the diagram.

The construction of the present "Zone A" scale illustrates adherence to logical principles. The diagram plots the rates originally prescribed by the Commission. Beginning at 16 cents, for 5 miles, the rates increased one cent in 5 mile blocks to 50 miles, one-half cent in 5 mile blocks to 100 miles, one cent in 10

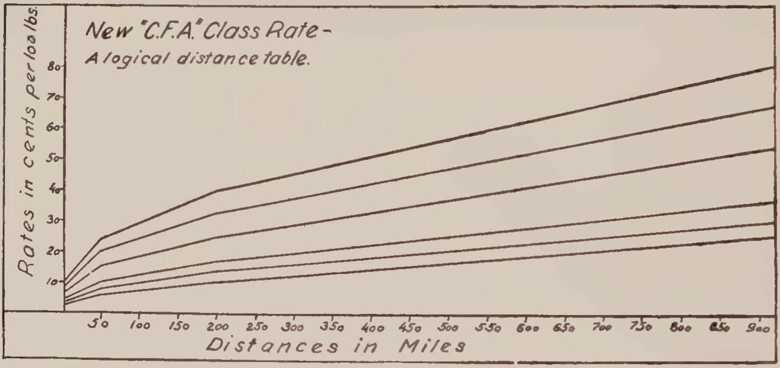


PLATE 9.

mile blocks to 200 miles, one-half cent in 10 mile blocks to 300 miles, and one cent in 20 mile blocks to 660 miles. The relationship of the lower classes to the first class rates was established in terms of the following percentages:

Classes	*1*	*2*	*3*	*4*	*5*	*6*
Percentages	100	85	67	50	35	28

These percentages are typical of those prescribed by the Commission in cases in which general governing mileage scales have been established.[1] Such commodity rates as are fixed, not upon an arbitrary basis, but in terms of a percentage of a class rate, are thus indirectly based upon the first class rates, and so conform to the general scheme of rate making. Other mileage tables

[1] See Consolidated Classification Case, 54 I. C. C. 1, 83, and the cases there cited; Memphis Southwestern Investigation, 55 I. C. C. 515, and Rates to, from, and between Points South of the Ohio River, 64 I. C. C. 107, 134.

The C. F. A. interclass relationship has been maintained with each readjustment of the general rate level; i.e., the 1st class rate has been increased or decreased, and the other classes calculated in terms of the percentages originally fixed by the Commission order. The Missouri River-Nebraska scale, however, has had the rates changed for each block and class, according to the blanket supplement percentage adjustments. Slight differences result from the use of the two methods, in disposing of fractions.

established by the Commission have been built up on the same general scheme.

§ 6. These distance scales have been tables of maximum rates applying within specified territories for the distances involved. They have not been published in tariffs, but have governed the construction of tariffs. In general, these bases of rates have been created to "iron out" inconsistencies or to remove discriminations, although the carriers' need of additional revenue was recognized in both the C. F. A. and New England Cases. As a practical matter, the scales have applied also pretty largely as minimum rates for the short line distances. Some minor differences in treatment have been developed; thus the C. F. A. scales have been used to build up small groups; while the Missouri River-Nebraska scale has been applied on almost a strict mileage basis. In the Memphis-Southwestern Case, bridge tolls were provided to cover the special expense of crossing the Mississippi River; in the Natchez Case, a "constructive mileage" of 20 miles was allowed to compensate for the cost of ferrying the cars. Sometimes it has been provided that two line hauls should be on a higher basis than single line hauls; sometimes there has been no such distinction.[1] In the Shreveport Case, the Texas scheme of "differentials," added to the Common Point rates, was adopted in the construction of rates between Shreveport and the sparsely settled portions of Texas.[2] In the New England Case, and in the Natchez Case, the sparseness of traffic on branch lines, or financially weak lines was given recognition by division of the carriers into "Class A" and "Class B" roads.[3] Such practice could not be possible were the carriers' branches interlaced, and were all traffic highly competitive, as is the case in Central Freight Association Territory.

The mileage scales which the Commission has prescribed to fit into the established rate territories have, very generally, been class rate scales. These readjustments have largely resulted, either from discriminatory practices due to intrastate rates prescribed below interstate rates, or to need for revenue, when the existing adjustment was "illogical." Commodity rate adjust-

[1] Memphis-Southwestern Investigation, 55 I. C. C. 515, 579. See the Shreveport 1st class rates, as plotted, p. 143, Plate 6.
[2] R. R. Com. of La. *v.* A. H. T. Ry. Co., 48 I. C. C. 312, 346.
[3] Proposed Increases in New England, 49 I. C. C. 421, 458.

ments of this character have been seldom prescribed, and then only with great hesitation. This condition has not been due to the fact that commodity rate structures are largely built up on the distance principle. Quite the contrary is the case. Commodity rate adjustments represent an equilibrium of competitive interests, carrier and allied shippers matched against competitors. To break down a nicely adjusted compromise rate structure which lets everybody into the market must affect a large number of conflicting interests. Let the existence of an established rate structure be threatened, and watch the scramble of business men and railroads to protect "vested interests." Ancient enemies bury the hatchet, for the business interests of the railroad and its customers in the territory economically tributary are interdependent. This condition governs all negotiations for rate adjustments. The individual railroad manager, unless his line is choked with traffic, is concerned with developing traffic which he can count on holding. It is his interest, quite as much as it is the interest of the business organizations and producers which his road serves, that no competitive source of supply, or no competitive distributing center, secures rate adjustments which operate to his relative disadvantage.

§ 7. "Market competition" is, therefore, more than a "euphemism for railroad policy." It is the practical manifestation of this mutual interest of the railroad and its customers.[1] However much one group of business men may dislike a particular commodity rate adjustment, they may well hesitate to press

[1] The common interest is well illustrated by the commodity rate structure governing the movement of "Lake Cargo" coal from West Virginia and Kentucky, emphasizing the practical bearing of the mutual relations of the carrier and the producing territory which it alone serves. "Lake cargo coal" moves from the mines to Lake Erie ports for transshipment by vessel, furnishing back loading for the boats bringing ore from the Minnesota ranges. The business is highly competitive, as between carriers and mine operations. In general, the individual railroads serve different fields, and participation in the business is insured by equalizing the rates from districts which are substantially the same distance from the ports. A similar equalization is in effect on coal hauled from the West Virginia mines to tidewater. The mutual interests of the competing mine operators and competing railroads are held in equilibrium by the equalization. In 1912, indeed, the Norfolk & Western had been given permission to advance its rates from the Pocahontas field, above the level of the rates of the Chesapeake & Ohio from the New River field, when the Commission held that the N. & W. had justified proposed advanced rates while the C. & O. had made no case. But the Norfolk & Western withdrew its tariffs carrying the advanced charges when the permission to advance rates from the competing field

applications for changes because of the possible consequences—preferring to bear the ills they know rather than to fly to others they know not of.

The method by which these commodity rate adjustments have grown up accounts for this conservatism. The function of railroad managers in building up industry along newly constructed lines of railroad operated to minimize the application of the distance principle. The railroad managers were required to cope not only with the new railroads, but with new industries. The business man who sought to build up a business in a competitive commodity resorted to the railroad managers with his problem. He presented them with statements of his manufacturing costs, the location of his market, the price set by his competitors which he must meet, and the margin of profit which he hoped to secure. Upon such information as this, the railroad traffic manager sought to provide a rate which would enable the business to grow, or advised of the unwisdom of the proposed location. The railroads even had industrial agents seeking propositions like this. If it was apparent that the freight rate which the manufacturer would require would be so low as to be non-compensatory to the railroad, or would result in such preference as to cause immediate demands from others for a general reduction in rates, the traffic manager was forced to decline the request for assistance. On the other hand, if it appeared that the business could grow and prosper on a reduced rate which, when consideration was given to the volume of the traffic, would produce a substantial revenue to the railroad, the traffic manager then lent his aid to the enterprise by adjusting rates to accomplish the desired end. Railroads competed with each for the location of new industries on their rails, and, after they were once located, fostered their growth. This method of procedure created the great bulk of the commodity rate structures on which highly competitive commodities move.

The Commission has not condemned the practice of the carriers in thus seeking to equalize opportunity for the producers on their lines. It has for itself, however, repudiated any responsibility to

was denied. To have maintained the higher level of rates would have placed the mines on the N. & W. at a competitive disadvantage. More traffic at the lower rates proved to be better business for the carrier than less traffic at higher rates. See Plate 15.

place competitors in all markets;[1] and the carriers have been adjured that, in laying aside transportation conditions and creating a rate relationship based largely on commercial factors, they must act "consistently so as to avoid artificial and undue advantages for shippers to the prejudice and disadvantage of others." Although, more than once, the Commission has appeared solicitous of preserving the integrity of a rate structure, this solicitude has always been subordinated to the principle that unjust discrimination should be avoided. A mere showing that a rate structure might be disrupted has not been accepted as estopping readjustment needed to establish a particular reasonable rate, or to remove unjust discrimination.[2]

But because distance comparisons are, after all, the essence of a showing of discrimination, the Commission is being forced to use the distance principle even in the face of a recognized probable disruption of railroad and industrial affairs. There can be no question but that mileage tables of rates based upon differences in distance would produce an absolute mathematical equality of treatment if the operating and transportation conditions were the same. It is also clear that if a mathematical adjustment be made for differences in transportation conditions and operating costs, a mileage scale can be made to work substantial justice and equality. But the application of a strict mileage basis to freight rates would seriously dislocate the tonnage of the country, injure many successful commercial localities and businesses, and probably defeat the effort to give general satisfaction which its proponents would be seeking. The difficulty is that the output in certain areas, the result of large investment, would be cut off from its usual market with the outcome either of destroying the value of the investment, or of forcing invasion of new territory. Provided a consuming market can be developed capable of absorbing the output there need be no "long run" hardship, except that from disrupting old commercial affiliations and developing new ones—seldom an inexpensive process.

If complaints from rival producers become so aggravated and

[1] Iron and Steel Cases, 36 I. C. C. 86, 100; Big Basin Lbr. Co. *v.* S. P. Co., 37 I. C. C. 730, 737; Hutchinson Traffic Bureau *v.* A. T. & S. F. Ry. Co., 40 I. C. C. 160, 164; Lake Cargo Coal Rates, 46 I. C. C. 159, 166.

[2] Pardee Works *v.* C. R. R. of N. J., 39 I. C. C. 162, 165; Bituminous Coal to C. F. A. Ty., 46 I. C. C. 66, 119.

insistent against each other, those who are called upon to adjust the difficulty may finally resort to the strict mileage principle in order to insure absolute mathematical equality. Within the past few years in dealing with the grain rate adjustment in the Middle West, the Commission had occasion to comment on the difficulties which it faced in this respect. Shippers located at Des Moines, Iowa, complained of rates to Missouri, alleging that competitors located at St. Joseph and Kansas City had relatively lower rates so far as distance was concerned. In directing attention to the difficulties which would arise from an attempt to adjust this complaint upon the basis of the distance principle, the Commission said:

> "It appears from the record that St. Joseph and Kansas City are at a disadvantage in shipping into southwestern Iowa, and it must be obvious to complainants that by pressing their claims for an extension of their jobbing territory they court similar action by their competitors in adjacent states who may challenge the fabric of Iowa state rates on grounds similar to those which prompted Council Bluffs and Sioux City to challenge the Nebraska state rates in Missouri River,—Nebraska Cases, *supra*. This is not to say that a community suffering from unjust or discriminatory rates should be deterred from making complaint thereof because other places may be moved to take similar action resulting in disadvantage to the first-named community. But there is some force in the consideration that where conditions have measurably adjusted themselves to rate relationships, and where each community in turn has some advantages and some disabilities which on the whole do not compare unfavorably, each to each, a complete rate upheaval which eventually results in a redistribution of advantage and disadvantage not wholly dissimilar to that which existed when the readjustment was made may not in every case result in a marked betterment, and can in few and exceptional cases yield advantage alone to a particular community."[1]

The actual results of the cement rate adjustment illustrate workings similar to those here anticipated from an application of distance rates to a rate structure originally developed under a competitive method of rate making. Rival mills were located upon the rails of competing carriers and each carrier had sought to secure the largest possible volume of tonnage by providing rates that would enable the mill on its line to reach the principal

[1] Greater Des Moines Committee *v.* C. St. P. M. & O. R. R. Co., 42 I. C. C. 65, 73.

markets in the territory. The situation which developed is illustrated by the location of a mill at Hannibal, Missouri, on the lines of the Burlington and the Wabash. An extremely low rate was provided for transportation of cement from Hannibal to Chicago, with the result that the cement moved in solid trainloads. But complaints of unjust discrimination were filed, particularly by mills located in the Kansas Gas Belt, which had originally operated at very low costs by reason of the use of natural gas as fuel. With the exhaustion of this fuel supply these mills found themselves facing higher operating costs, and as a result sought to continue their business in distant markets by readjustment of freight rates. They filed complaint with the Interstate Commerce Commission. Other cement interests intervened and finally the Interstate Commerce Commission on its own motion inaugurated an investigation into all cement rates in the territory. As a result of this investigation it prescribed several different scales of rates based on mileage. These were frankly designed to place shippers upon a mathematical equality, although differences in the operating conditions in different parts of the territory were given consideration. The scales were designed to produce approximately the same carrier revenue on the assumption that the same volume of tonnage would continue to move.[1]

As a matter of fact the same tonnage did not continue to move. The old competitive equilibrium was broken up. The mileage basis of rate making dislocated the system of distributing a considerable portion of the product of the rival mills. Where trainloads of cement had moved from Hannibal to Chicago, scarcely a car moved under the mileage scale of rates, and the producer located at Hannibal dropped out of the Chicago market, leaving competition there to producers located within a shorter distance of that city. In order to dispose of its product the Hannibal mill then sought markets elsewhere, among other places, in Nebraska, where it had a distance advantage. The result was that complaints were soon filed by other mills, especially those located in Kansas and Oklahoma, alleging that the rates should be revised so that they could retain their markets in Nebraska. This effort to transform a competitive method of

[1] Western Cement Rates, 48 I. C. C. 201.

rate making on a highly competitive commodity to a mathematical method of rate making has not, therefore, attained unalloyed success. Numerous complaints have been filed against the adjustment and there seems to be little probability that general satisfaction will permanently result. The great consuming market is too far from mills with large capacity.

§ 8. Nevertheless there is no other satisfactory yard-stick for a regulatory body to use in measuring alleged unjust discrimination than that of distance, coupled with adjustments for difference in operating conditions. Under a plan of government ownership, it is quite probable that after a few years of preferential adjustment secured through political prestige, the government itself would ultimately be driven to set flat mileage scales with notice to the shippers that they must use them or not as they could. The distance scales offer the only method of attaining mathematical equality. But, if the rates are to be made with this mathematical precision, the function of the traffic manager under a system of private ownership has certainly been seriously curtailed. At the time of the passage of the original Act to Regulate Commerce in 1887, there was a great deal of discussion on the floor of both houses of Congress of the disaster which would result from rate making based on distance alone. Each section of the country was fearful that its producers would be shut off from distant markets and that its industries would be injured. The mileage scale method of rate making undoubtedly circumscribes the activities of producers who seek to market their goods in distant markets, in competition with competitors located closer at hand. It may be argued, as the Commission stated in dealing with the cement rates, that long distance competition tends to promote a wastage of transportation.[1] Nevertheless the industries of the country and the traffic of the railroads have been built up on the idea of enabling competitors to reach markets

[1] "Those who propose a system of rates, the avowed purpose of which is to promote long distance competition, confuse an economic problem with a transportation problem. Primarily it is not our concern to equalize market competition. A shipper who comes to us with a proposition of this character, urging that the difference in freight rate against him is what keeps him out of an important market near which a competitor is situated, implies to a greater or less extent that the difference in freight rates represents the amount of his handicap. But freight is only one of the factors in a shipper's selling price. . . . We cannot overlook the fact that though a cement mill is located at a distance from important markets, the location

as wide as possible, so long as the rates which they could pay contributed something more than out of pocket costs.

The future of the mileage scale, as applied to commodity rate adjustments, promises to be a serious problem to shippers and carriers alike. If successful resort to the rate making power of the Interstate Commerce Commission inevitably means the prescription of mileage scales on particular commodities within a certain territory, conceivably shippers may conclude that they will be better off under the competitive rate making system which may have in it minor difficulties, but which on the other hand has tended to build up their business. After all, considered in the light of the development of railroad rates and industrial centers in the United States, a strict application of the mileage principle appears to be the rate making of desperation.[1]

has presumably been selected advisedly, and that due consideration has been given to the question whether its remoteness from these markets is balanced by compensating economies not available nearer to the destinations. . . . We must not be understood, however, as opposed to any plan which will result in the making of reasonable rates for long distances. What we do consider as unwarranted is the formulation of a scale for the expressed purpose of affording a long distance competition at rates which are unreasonably low." Western Cement Rates, 48 I. C. C. 201, 234.

[1] "This proceeding is additional evidence 'that there has never been an adjustment that was satisfactory to the rival markets.' Perhaps only a uniform mileage scale would preclude claims of relative maladjustment, and while no market desires this system to be here applied or applied generally, eventual resort to this basis may possibly be the only outcome of reiterated complaint over a complex situation which we have repeatedly tried to adjust." Minneapolis Traffic Asso. *v.* C. M. & St. P. Ry. Co., 46 I. C. C. 685, 692.

CHAPTER XI

THE LONG AND SHORT HAUL PRINCIPLE

§ 1. The principles that rates may not be so high as to divert profitable traffic to an alternate route and that rates by competitive routes must be the same if service conditions are the same together account for the importance of another principle of rate making, the long and short haul rule. The long and short haul rule may be simply stated in the words of the Interstate Commerce Act:

> "It shall be unlawful . . . to charge or receive any greater compensation in the aggregate for the transportation of passengers or like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance."

When strictly enforced, the long and short haul rule requires that a carrier seeking to meet the rates of competitors must apply the competitive rates as maxima at intermediate points. Whether intermediate points shall be grouped with the competitive points, or whether the rates shall be graded back on the tapering basis must depend upon the particular facts of the individual situation.

The long and short haul clause of the Interstate Commerce Act is not a rigid requirement. After stating the general principle which establishes the usual governing policy, the Act provides further that the Commission may, in special cases, grant applications of the carriers asking permission to charge more for the shorter distance than for the longer distance. The burden

of proof rests upon the carrier.[1] Such an application is known as an application for "Fourth Section Relief" (the long and short haul clause is contained in Section Four of the Act), and, when granted, permission given in a "Fourth Section Order" is known as permission to depart from the long and short haul rule, or "the rule of the Fourth Section."

§ 2. Problems arising under the long and short haul clause are not, moreover, considered apart from the basic principles of the Act. Each tariff which contains a Fourth Section departure must carry, on its title page, reference to the authorizing order of the Commission, or to the pending application in the event no order has been issued. This is notice to the user of the tariff, and conforms to the principle that there must be surety of charge.[2] The resultant rate structure as a whole may be neither unreasonable nor unduly discriminatory. As a result, the investigation of every application for Fourth Section relief must cover the following points:

1. The justification of the depressed long haul rates.
2. The adequacy and reasonableness of these rates.
3. The reasonableness of the higher intermediate rates.
4. The relative reasonableness (discriminatory character) of the resultant rate structures.

The principal inquiry, however, usually looks to the justification of any Fourth Section departure. Demonstration of such justification is an essential first step. Competition has been held the governing element.

§ 3. Competition, as a factor in rate making, consists of those

[1] "It was the manifest intent of Congress to put a stop to this form of discrimination in so far as that could properly be done, and it ought to be snuffed out in its infancy before property rights and commercial conditions have intervened to render the thing aimed at difficult of accomplishment." Lumber Rates from the South, 25 I. C. C. 50, 60. And see Transcontinental Commodity Rates, 26 I. C. C. 456, 460.

[2] To cut down unnecessary expense of publication, where tariffs naming commodity rates cannot be issued under the Fourth Section without providing an intermediate application, under which circumstance it would be necessary to post large numbers of tariffs at points from which no shipments are likely to move, the Commission has ruled (Rule 77 of Tariff Circular 18-A and reissues) that carriers may file commodity rates applicable from known points of production or to known points of consumption without making such rates applicable from or to all intermediate points, with notice on the title page, that upon "reasonable request" the rates would be made applicable from or to an intermediate point, upon one day's notice to the Commission and the public.

forces effective through the striving for traffic by alternate routes, which operate upon rates, rather than upon service.[1] When the volume of business is sufficient to support a desire to participate in its movement, the alternate routes must meet the lowest rate set by any existing route providing standard service, or must equalize superior service by rate differentials. When the service is the same, or the disadvantages have been thus equalized, all carriers are in position to take the business on equal terms. All participate in agreeing upon the rates; no one "controls." It is when one competitor, or one class of competitors is free to cut the rates, and the others are not in position to follow these cuts, that the rates for the latter are "controlled."

The Commission has granted Fourth Section relief when the long haul rate has been held on an unreasonably low or subnormal basis (1) because of short line rail competition; (2) because of water competition; or, (3) in exceptional cases, because of rail competition from an alternate source of supply—"market competition." Even motor truck competition has been considered.[2] To justify departure from the long and short haul rule, the competitive force must set a level of rates, at competitive points, below that which the carrier petitioning for Fourth Section relief would otherwise establish as "reasonable." This desire to depress long haul rates, while holding up intermediate charges, arises from the fact that, out of the sum total of operations, the railroad must be made to pay. There must be a fair return on the value of the property, whatever that may mean. It is good business to take traffic at rates making a minimum contribution above "out of pocket" expense, rather than to lose the traffic to a competitor; whether water line, railroad or motor truck. Intermediate rates cannot be graded back or blanketed, if greater contributions above "out of pocket" expenses are needed to make operations as a whole profitable.[3]

[1] "To compete is to strive for something which another is actively seeking and wishes to gain." U. S. *v.* U. P. R. R. Co., 226 U. S. 61, 62, 87.

[2] Coal Rates from Anthracite Region, 28 I. C. C. 235.

[3] The issue of the fair return on the value of the property was carried into the Spokane Case, and extended testimony introduced by the railroads, which alleged that a readjustment of rates such as the Spokane interests sought would be confiscatory, because carrying the total return to the carriers below a fair level. Spokane *v.* N. P. Ry. Co., 15 I. C. C. 376; also R. R. Com. of Nev. *v.* S. P. Co., 21 I. C. C. 329, 340.

The problem of the weak lines appeared in Fourth Section Violations

§ 4. The competition of the circuitous rail route arises from the desire to utilize unused capacity, in much the same way, and for much the same reasons that the railroad seeks to build up business by low rates on "low grade" traffic.[1] Traffic can be secured at competitive points only by meeting the short line rates. It is the case of charging what the traffic will bear without diversion, of meeting rates set by the short line. Does this constitute unjust discrimination? The long haul rates are those fixed by the short line, and, if the circuitous route did not participate in the business at all, the effect if higher rates were charged by the circuitous route, the intermediate points would not be helped, but might be harmed because of the lessened ability to give service. So long as there is unused capacity via the roundabout line, the contributions above "out of pocket expense" can be minimized. If the long haul rate is not compensatory in this special sense, the business obviously is better left to the short

in the Southeast, 32 I. C. C. 61, 74-81—discussion of the "short lines"; Ohio River Case, 38 I. C. C. 411, 426-7, the Louisville, Henderson & St. Louis; Bituminous Coal to Mississippi Valley, 39 I. C. C. 378, the Mississippi Central, Gulf & Ship Island and New Orleans Great Northern; see also Petition, L. & N. R. R. Co., 1 I. C. C. 31.

[1] The following argument of Mr. Walker D. Hines, then counsel for the Louisville & Nashville, states the extreme case for the policy of Fourth Section departures. Fundamentally (and under the present law) it is inadequate because there is no competition between coal and cotton, whereas business men in the same line, but in different cities, do compete. Interpretation of Section 4, in the light of the requirements of Section 3 (not possible until the 1910 Amendment) changed the basis of enforcing the rule, and invalidated Mr. Hines's argument. He was testifying before the Elkins Committee in 1905.

"The theory with respect to charges for long and short hauls, where competition compels a lower charge, is exactly the same as the theory on which a railroad charges very much more for a higher class of traffic than for a lower class of traffic for hauling the same distance.

"There is very little difference between the expense of hauling a carload of dry goods weighing 40,000 pounds and hauling a carload of coal weighing the same. If the same rate were charged on both classes of freight, the result would be either that the rate on dry goods would be so low that the general result to the company would be unprofitable or the rate on coal would be so high that it would not be hauled at all. As a matter of fact, the rate on dry goods is eight or ten times as much as the rate on coal, but there is no corresponding difference in cost. The total results to the company are not excessive, and the rates have to be apportioned, as between the different kinds of traffic so that the low grade traffic, which cannot stand a higher rate, will be carried at a rate which it can stand. . . . Exactly the same theory operates with respect to the long and short haul. If you charge against the long haul all the cost of operating the railroad, or its proportionate part, it would cost more than for the short haul. But the long haul traffic would not be hauled at all." Senate (Elkins) Committee Hearings, p. 1099.

line. It is doubtful if any railroad manager would long care to pay for the privilege of hauling traffic around Robin Hood's barn.

To permit charging a higher rate at an intermediate point on a circuitous route is not necessarily in violation of the distance principle—or at least the conflict of principle is much less real than a hasty glance at a map would imply. In the diagram, points C and F are equally distant from A; so are D and E. If the tracks from F to E were owned by an independent company, and transportation to E involved a lateral line haul via F,

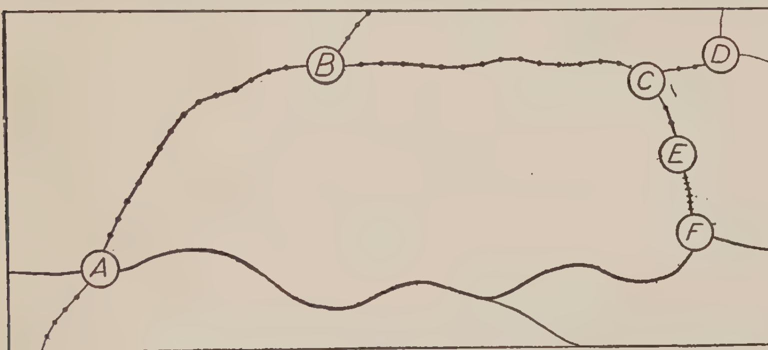


Plate 10.—Circuitous Competition.

as well as via C, and the A-B-C company, conformity with the distance principle would equalize rates at C and F, and competition would equalize the rates at E via the alternate routes. Under the distance principle these would exceed the A-C and A-F rates. Does a mere transfer of ownership of the line E-F change the economic situation? Clearly the line, A-B-C-F, would be forced to equalize the direct line (A-F) rates at F. Must it, therefore, blanket the rates from C to F, when formerly on the distance basis it was not unreasonable to charge more at E than at C? And, if the rates at E are equalized with the rates at C and F, has the business man at D, a right to set up complaint of discrimination? The Commission has recognized the complications involved in this situation. Congress, in 1920, amended the Fourth Section to meet this situation consistently:

"If a circuitous rail line or route is, because of such circuity, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher charges to or from inter-

mediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points."

Under this rule (which, after all, merely carries into the Act a rule which had been for some time a working tool of the Commission) the line A–B–C–F would not be permitted to charge more than the A–F rates at point C. Whether more might be charged at E would depend upon the circumstances of the particular case. The maximum allowed at points circumstanced as is E in the diagram has been a rate fixed on a continuance of the governing mileage scale subject to the "back haul" combination on F as a maximum.[1]

§ 5. But when is a line sufficiently circuitous to justify the holding that it merely accepts the rate controlled by its competitor? The Commission soon found it necessary to adopt a minimum mileage relationship, not expressed in a formal rule to be rigidly adhered to, but in practice of almost general application. Permission to depart from the rule is usually granted only to a line, the length of which is at least 115 per cent of the short line distance between the competitive points. The figure of 15 per cent marking the line of cleavage between those carriers required to conform to the rule, and those granted permission to carry higher intermediate rates was originally developed by the Commission in passing upon passenger fare applications.[2] Mention in a formal opinion involving freight rates was not made until June, 1912; and then only with careful qualification:

[1] See, for example, the "zig-zag" case, Johnson *v.* A. T. & S. F. Ry. Co., 51 I. C. C. 356. With this requirement was frequently coupled a maximum scale for the distance in excess of the short line distance, see for example, New Orleans Cotton Exchange *v.* L. & N. R. R. Co., 46 I. C. C. 712, 748:

"The rates made by the direct lines from the competitive points shall be the basis for the rates from points on the indirect lines; that is to say, the rates from points on indirect lines seeking relief that are not more distant from destinations than the competitive points shall not be higher than from the competitive points, and rates from more distant points shall be graded at not more than one cent for 100 pounds for each 10 miles, or fraction thereof, of additional distance." In Lookout Paint Mfg. Co. *v.* T. A. & G. R. R. Co., the Commission required that rates to points on the circuitous lines (Chattanooga-Birmingham) might not exceed the short line rates unless the distance exceeded 143 miles (the short-line distance), providing further that beyond 143 miles the rates might increase for each 15 mile block, or fraction thereof—the combination on Birmingham being the maximum as that city was approached. 49 I. C. C. 40.

[2] 25th Annual Report I. C. C. (1911), p. 21.

"In disposing of fourth section applications covering passenger fares, we ordinarily treated a line as circuitous if it exceeded the direct line in mileage by not less than 15 per cent, and we think the same rule might be fairly applied here. We do not hold that this rule should be made one of universal application in disposing of fourth section applications involving rates of freight."[1]

The application of the 15 per cent rule is, however, usual, if not universal—illustrative of the tendency of government regulation to establish a yard stick for routine use: "generally speaking, relief will be granted where the distance via the indirect line or route is more than 15 per cent greater than the distance via the direct line or route."[2]

Two important classes of exceptions to the 15 per cent rule do occur: exceptions based upon the necessity to consider a rate structure as a whole, and the necessity to recognize the interest of the individual carrier in handling traffic on its own line to its own advantage. Usually the two issues merge.

[1] In re Rates on Salt, 24 I. C. C. 192, 195.

[2] Oklahoma Cottonseed Crushers Asso. *v.* M. K. & T. Ry. Co., 39 I. C. C. 497, 512; in Cohen-Schwartz *v.* M. L. & T. R. R. Co., 59 I. C. C. 202, 203, it was said: "The defendants contend that theirs is not the rate making line from the point involved, that they meet rates made by competing carriers and that their route is circuitous. The evidence shows that the distance over the route of movement herein is less than 15 per cent greater than that over the route of the competing carriers, and is therefore not sufficiently circuitous to warrant fourth section relief." Other typical cases involving the 15 per cent rule are: Fourth Section Violations in the Southeast, 30 I. C. C. 153, 336; 32 I. C. C. 61, 66; Supplementary Bowling Green Case, 31 I. C. C. 1, 4, where the long line was "approximately 15 per cent;" New Orleans Cotton Exchange *v.* L. & N. R. R. Co., 46 I. C. C. 712, 751; Memphis-Southwestern Investigation, 55 I. C. C. 515, 566; Arkansas Jobbers & Mfrs. Asso. *v.* Director General, 57 I. C. C. 231, 240; Coffee from Galveston, 58 I. C. C. 716, 727.

In West Virginia Rail Co. *v.* I. C. R. R. Co., 53 I. C. C. 21, 27, permission to depart from the rule was granted, although the "percentage of circuity" was "slightly less than 15 per cent." Typical cases denying relief are: Marshalltown Buggy Co. *v.* Wabash Ry. Co., 39 I. C. C. 633 (13 per cent); and Richmond Com'l Club *v.* L. & N. R. R. Co., 40 I. C. C. 451, 452 (10 per cent). A mere showing of circuity to the extent of 15 per cent does not insure granting of the Fourth Section application; the long haul rate must be less than a reasonable rate for the long haul distance. The distances from Baltimore to Richmond were, via the Richmond, Fredericksburg & Potomac, 156 miles; via the Chesapeake & Ohio, 210 miles—134 per cent. It was held that the C. & O. must carry the Richmond rate as a maximum if it desired to participate in the traffic. Richmond Oil Co. *v.* A. C. L. R. R. Co., 50 I. C. C. 213. In McCaull-Dinsmore Co. *v.* G. N. Ry. Co., 38 I. C. C. 297, 298, the request of the C. B. & Q., operating a route 124 per cent of the short line distance, for permission to charge lower rates to St. Joseph, Mo., from St. Paul than from Sioux Center, Iowa, was denied.

§ 6. In the case of an established rate structure,—the result of years of struggle, negotiation, and compromise—the Commission has permitted the carriers to depart from the rule. This, indeed, is a "special case"—"in essence, the case of a circuitous route." Let the group rates be "reasonable" and the competitive adjustment not otherwise unduly discriminatory, and the Commission has always been hesitant to disrupt the established structure solely because of Fourth Section violations. Thus group rates are published from lumber producing points in the Southern Yellow Pine Territory to the Ohio River: say a 14 cent rate from Group A, a 15 cent rate from Group B, a 16 cent rate from Group C, and a 17 cent rate from Group D. Shall the carrier whose line leads from points in Group A through Group C points be required either to withdraw from the Group A business, or to reduce the Group C rates? Such reduction would cause other carriers to meet the rates in order to protect the Group C mills on their lines, and conceivably further Fourth Section violations —say for the line leading from Group C through Group B— would be created. To require the first line to withdraw from the business would cut off needed revenue, and would deprive mills in Group A of an Ohio River market unless they had access to an alternate route.[1]

§ 7. In the South, the problem is complicated by the presence of a number of short lines, located at right angles to the main flow of traffic. They are dependent upon their connections (which on parts of their traffic are their competitors) for participation in long haul business. Almost without exception, they are in precarious financial condition and must squeeze every possible cent out of the traffic secured. Since their traffic density is light, every additional movement of business is of extreme importance. Most of them had been in and out of the receiver's hands, or

[1] Lumber Rates from the South, 25 I. C. C. 50, 51. The same strategic situation is involved in Iowa State Board *v.* A. E. R. R. Co., 28 I. C. C. 193, 201, and in Proportional Class Rates to Iowa, 34 I. C. C. 278; and see Fourth Section Violations in the Southeast, Supplemental Case, 32 I. C. C. 61, 71, 72, 73, 80, 82, and Lumber Rates from Helena, 41 I. C. C. 565, 579. An earlier illustration, involving rates from Oswego and Syracuse, N. Y., via the D. L. & W., and Binghamton, is discussed in the 11th Annual Report I. C. C. (1897), p. 103. The Commission permitted the Elgin, Joliet & Eastern to haul Waukegan business through higher rated points such as Aurora. C. F. A. Class Scale Case, 46 I. C. C. 475. See Plate 17.

had operated at a deficit even before the critical period of the war and afterwards. Other lines, occupying similarly weak strategic position, have been saved from bankruptcy by their alliance with stronger systems; the Louisville, Henderson & St. Louis, controlled by the Louisville & Nashville, the old Memphis & Charleston (Southern Railway to Memphis), and the Columbus & Greenville, formerly the Southern Railway in Mississippi. The Interstate Commerce Commission has recognized the needs of these "short lines" when permitting them to meet the rates of their competitors at the junctions, and to charge rates at intermediate points, based upon junction point combinations, while working their traffic in both directions.[1] So long as these roads have not been financially strong enough to blanket the rates, they have been permitted to establish rates and operate their lines with consideration to their own interests.[2] The long and short haul principle is violated.

§ 8. In 1920 the Commission was forbidden to grant Fourth Section relief because of "merely potential water competition." This rule carried into the Act a principle of interpretation but recently developed by the Commission. Prior to its decision in

[1] Thus, Ohio River Case, 38 I. C. C. 411, 426, 427, it was said of the Louisville, Henderson & St. Louis: "Its entire rate adjustment is built up around Louisville, Henderson, Owensboro, and Evansville, and if it is compelled to observe the rates applying to and from these points as maxima to and from its intermediate stations, the necessary result would be . . . a reduction in its total revenue so great as to make it doubtful whether it could earn operating expenses." See Bituminous Coal to Mississippi Valley, 39 I. C. C. 378, 386; and New Orleans Cotton Exchange *v.* L. & N. R. R. Co., 46 I. C. C. 712; 49 I. C. C. 271, 278.

[2] In New Orleans Cotton Exchange *v.* L. & N. R. R., 46 I. C. C. 712, 749, the Commission said: "The position of many of these lines is illustrated by that of the Georgia & Florida Railway. Its main line runs from Augusta, Ga., in a southerly direction to Madison, Fla., 250 miles, with several branches aggregating 90 miles. In the 250 miles of main line it meets or touches the Southern Railway, the Atlantic Coast Line, the Central of Georgia, the Atlanta, Birmingham & Atlantic, and the Seaboard Air Line, all of which have lines running directly to one or more of the South Atlantic ports. If this road secures any cotton at Augusta consigned to Savannah, it may be hauled to Midville, and there turned over to the Central of Georgia, or it may be hauled to Hazelhurst and there turned over to the Seaboard. If it receives any traffic at Vidalia consigned to Brunswick, it may be hauled to Hazelhurst, Douglas, or Willacoochie, and at one of these points turned over to other lines reaching the port of Brunswick." See Map, Douglas *v.* A. B. & A. R. R. Co., 28 I. C. C. 445, 449.

Over the dissent of Commissioner Hall, the Tennessee Central was given permission to violate the Fourth Section at points between its terminals. Murfreesboro Board of Trade *v.* L. & N. R. R. Co., 73 I. C. C. 228.

the Memphis-Southwestern Case [1] (December 2, 1919) there had been very general recognition of the controlling influence of potential water competition: competition that would be brought out by a level of rates higher than that in existence. Only occasionally had skepticism been expressed.[2] The Memphis-Southwestern opinion was, therefore, really a reversal of opinion. It denied the right to depart from the rule of the Fourth Section unless water competition actually set the depressed long haul rates. If the railroad "held the umbrella," the water line merely following its lead and setting rates on a differential basis barely compensating for disadvantages in service, the water competition, even though existent, was held to be non-controlling. On the Mississippi, the volume of water-borne business was not sufficient to constitute a real force for holding down the rates. As a matter of policy, the rail carriers, notably the Illinois Central, cut the long haul rates at the river landings, controlling water competition by driving it out of existence. The smaller volume of business offered, and the unused capacity of the Illinois Cen-

[1] 55 I. C. C. 515; Murfreesboro Board of Trade *v.* L. & N. R. R. Co., 55 I. C. C. 648. Meridian Traffic Bureau *v.* Director General, 57 I. C. C. 107, 110.

[2] It is true, however, that a growing attitude of skepticism toward permitting departures because of potential water competition can be traced in the I. C. C. opinions. When the alternative water route was so circuitous that no traffic would move in competition with the rail carrier (Cullman Commerce Club *v.* L. & N. R. R. Co., 33 I. C. C. 634), the competition was held to be too improbable to warrant serious consideration. Earlier,—Rates between Shreveport & Texarkana, 32 I. C. C. 180, 183,—depressed Shreveport rates had been refused approval because of the disappearance of water competition on the Red River. Commissioner Harlan saw the drift in 1917. The majority of the Commission had held that the withdrawal of tonnage from coast-to-coast business had removed active water competition and had required a readjustment of transcontinental commodity rates. Commissioner Harlan dissented:

"Case after case may be cited from the reported decisions of the Commission where actual water competition had altogether ceased and the continuance of such rate relationships was nevertheless sanctioned and approved because of the potential competition growing out of the availability of an open water route. This principle is here set aside, as I read the majority report." . . . Transcontinental Rates, 46 I. C. C. 236, 280. As late as June 25, 1918, however, the Commission had said:

"There is potential competition and its depressing effect upon rates has been repeatedly recognized by the Commission. The evidence unquestionably supports the defendant's view that higher rates from Vicksburg to Ohio and Mississippi River crossings and points in Central Freight Association Territory than at present maintained would tend to drive the lumber traffic to the water routes." Pelican Lbr Co. *v.* V. S. & P. Ry. Co., 50 I. C. C. 540, 541, where the Commission even proceeds to discuss "the degree of potentiality" at Mound, La., as compared with Vicksburg.

tral were such that this had seemed to the management the sounder business policy. On the Seaboard and Gulf, and on the Great Lakes, the boat lines were absorbed, and the level of charges held high.

The difference in policy is due fundamentally to the difference in the character of the transportation service demanded. The water lines, like the railroad, seek a two way business, and are in best position to compete when they can pick up cargoes without transshipment costs. The port to port business on the Atlantic Seaboard is especially suitable for the water carrier because it involves an exchange of manufactures for raw materials from principal producing areas, to and through principal business centers. Long hauls, a volume of high class business, and important terminals—these are the most favorable conditions for water competition. Boat lines not operating in connection with a rail carrier (and hence not subject to the Interstate Commerce Act and required to publish their rates) have consistently participated in the port to port business, cutting the rates of the railroad owned rivals.[1] The Mississippi Valley situation is quite different. For the great number of commodities the traffic is either short haul business, is light in volume, or is highly seasonal. The great northbound tonnage of the railroads, lumber, is not immediately tributary to the river, and a rail and river journey to most markets would require three handlings instead of the one which now suffices when the car is originally loaded at the mill.[2] More than this, it would require the principal rail lines to "short haul" themselves, a policy not probable under present density of traffic conditions. The Commission's conclusion that the rail carriers control the rate situation on the Mississippi is therefore sound.[3]

[1] On no other basis, indeed, could the rail lines, under the Panama Canal Act, have kept control of their boat lines; see Application, S. P. Co., in re Pacific Mail S. S. Co., 32 I. C. C. 690; Ocean S. S. Co. of Savannah, 37 I. C. C. 422; S. P. Ownership of Atlantic Lines, 43 I. C. C. 168; Interstate Commerce Commission Act, Sec. 5, Par. 9.

[2] Indiana Veneer & Lbr. Co. *v.* St. L. I. M. & S. Ry. Co., 37 I. C. C. 579, 581; Lumber Rates from Helena, 33 I. C. C. 297, 299; Earle Cooperage Co. *v.* St. L. I. M. & S. Ry. Co., 53 I. C. C. 295.

[3] The figures on traffic transported by the government barge line, Nov. 1, 1919, to Aug. 31, 1921, reflect the lack of balance in the traffic; of a total of 456,351 tons handled, 296,875 tons, 67 per cent, was southbound business, over one-half—157,505 tons—being grain. The month-to-month figures reflect substantially the same ratios; see Commerce Reports, November 28,

As a matter of fact, the economic advantage of the boat line, especially a river line, in its competition with rail lines has been much exaggerated. The service is not flexible and cannot be suddenly increased to meet the needs of a crop moving season, whereas railroad cars can be mobilized and scattered. The boat line in this service is most useful where, as in the case of the cotton crop, a short movement to a concentrating and grading market is an essential first step.[1] Where local business is relatively dense, on the other hand, as between St. Louis and the Ohio River Crossings, active water competition can enforce the level of rates rather than merely follow the lead of the railroad. The analogy with conditions on the Seaboard, the hauls being shorter, is very real; for the Ohio River Crossings are themselves centers of population and industry.[2] But between New Orleans and St. Louis, Memphis is the only river landing of any size. And it is most important as a cotton concentrating, grading and storage point.[3]

§ 9. Whether or not traffic will move by water in sufficient volume to influence the railroad rate level depends also upon the character of the commodity. Some commodities are not suited to water carriage, or their movement by water is highly improbable. Sewer pipe is such a commodity because of its susceptibility to breakage; cotton seed oil is another, because of the economy in handling in tank cars; a third is highly perishable

1921, p. 782, a report by the Transportation Division, Bureau of Foreign and Domestic Commerce. The published figures do not indicate the ton mileage; but it may fairly be presumed that the grain was principally bound for export; northbound, the principal tonnage was cotton, 61,648 tons, burlap, 20,385 tons, and coffee 20,935 tons. Lumber does not appear as a separate item, being included in "other," 19,027 tons. The service factor is also undoubtedly an element. The downstream schedule from St. Louis to New Orleans averages 8 days; upstream the average schedule is 16 days.

[1] New Orleans Cotton Exchange *v.* L. & N. R. R. Co., 46 I. C. C. 712, 734-43; 49 I. C. C. 271, 280.

The Commission, in the Transcontinental Cases of 1922, said: "On perhaps most of the commodities considered shippers as a rule prefer rail to water movement unless there is a differential of from 10 to 25 cents per 100 pounds, dependent upon the commodity, in favor of the latter. A few articles, like iron and steel, require nearly as low a rate by rail as by water." 74 I. C. C. 48, 60.

[2] Alton *v.* C. & A. R. R. Co., 28 I. C. C. 589, 593; Ohio River Case, 38 I. C. C. 411, 418; West Virginia Rail Co. *v.* I. C. R. R. Co., 53 I. C. C. 21, 27; and compare facts in Application, S. P. Co., Steamboats on Sacramento River, 34 I. C. C. 174, 648.

[3] Memphis Freight Bureau *v.* St. L. I. M. & S. Ry. Co., 39 I. C. C. 224, 242.

fruit or produce, for which refrigeration and quick delivery are essential.[1]

§ 10. When the competition is one of lines leading from alternate sources of supply, the Fourth Section problem is concerned not with charging what the traffic will bear without diversion, but with charging what the traffic will bear without destruction. The issue is clearest when a common market is located between alternate sources of supply and is reached by lines from opposite directions.[1] The problem is more complicated when competition

[1] Sewer Pipe from Jacksonville, 40 I. C. C. 568, 572; Brownsville Oil Co. *v.* C. R. I. & P. Ry. Co., 37 I. C. C. 503, 507; Fruits from Florida, 43 I. C. C. 595, 604.

The most comprehensive grouping of commodities based upon their availability for water transportation grew out of the intermountain readjustment. The original Fourth Section order of the Commission had prescribed the same treatment for all commodities. By 1914, when the powers of the Commission under the amended clause had been established, the Panama Canal had been completed, intensifying the coast-to-coast competition, through elimination of transshipment costs. It was alleged that the extent of the relief originally extended was not adequate in the case of the commodities best fitted for water transportation. The Commission took cognizance of this plea, and three main groups of commodities were recognized, the division based upon value per 100 pounds. Commodity Rates to Pacific Coast Terminals, 32 I. C. C. 611.

1. Schedule A included the commodities on which rates had not been seriously affected by water competition, such as bicycles, bronze, brass or copper goods, cash registers, electrical goods, glass, musical instruments, photographic plates, talking machines—high class traffic—some 115 carload items, on which all rates were to conform to the rule.
2. Schedule B included the commodities adapted for transportation by water, originating on the Atlantic Seaboard, so that it was thought possible to conform to the rule only from the Missouri River and West, such commodities as agricultural implements, aluminum articles, cider and vinegar, light sheet steel,—approximately 350 items.
3. Schedule C included the commodities especially adapted for water competition, originating in large volume on the Seaboard, and requiring a greater amount of Fourth Section relief than Schedule B commodities in view of the new competition, especially such commodities as structural iron and steel, iron and steel articles, bolts, nuts, castings, paint, paper, stoves, wire and wire goods.

[2] Grand Rapids Plaster Co. *v.* L. S. & M. S. Ry. Co., 41 I. C. C. 1; 57 I. C. C. 264. Compare Rates on Salt, 24 I. C. C. 192; Bennett & Son *v.* C. & O. Ry. Co., 38 I. C. C. 310. There is also discussion of the problem, complicated by water competitive conditions in Corp. Com. of N. M. *v.* A. T. & S. F. Ry. Co., 34 I. C. C. 292, 302.

In the Grand Rapids Plaster Co. Case, the important intermediate market was the territory including Chicago and Milwaukee, to which the Iowa lines proposed a 9 cent rate, with a 10 cent rate to nearer points in Illinois, and a 12 cent rate to nearer points in Wisconsin. The Milwaukee-Chicago Rate from Grand Rapids was 8.3 cents—83⅓ per cent of the 6th class rate, an adjustment previously approved by the Commission (Acme Cement Plaster Co. *v.* L. S. & M. S. Ry. Co., 17 I. C. C. 30)—resulting in a slight com-

focuses from three sides. Chicago, for example, can draw its cane sugar supply from California, Louisiana or the Atlantic Seaboard. Prior to 1914, the relative rates had been such as to bar the western refiners from the Chicago market, and the western railroads (which had a large empty car movement eastbound) proposed a readjustment: a 46 cent rate from California to Chicago, a 55 cent rate at the Missouri. The latter rate, already in effect, permitted the western refiners to compete with New Orleans, in the face of an unfavorable differential of 23 cents. The proposal of the western lines was, in substance, to carry this 23 cent differential into Chicago. This meant also a 23 cent differential in favor of the Atlantic Seaboard, for the New York lake and rail rates, and the New Orleans rates were equalized on the 23 cent basis. The 46 cent rate would develop new traffic for the western lines, substituting their facilities, and those of the California refiners, for those of Eastern interests. Because, therefore, this competition required the establishment of the 46 cent rate at Chicago, if the western lines and refiners were to participate in supplying Chicago with sugar, Fourth Section relief was granted. Market competition was recognized as controlling the long haul rates.[1]

In westbound transcontinental business, the alternate sources

petitive advantage for Grand Rapids. To the territory west, however, the Grand Rapids rates were above the Milwaukee-Chicago rates. If the Iowa lines were refused Fourth Section relief, it would be necessary for them to advance the Milwaukee-Chicago rates (meaning, in effect, a withdrawal from the business) or to blanket back the 9 cent rate. The latter alternative would have pleased neither party, for it would have meant a greater competitive disadvantage for the Grand Rapids producers, and a shrinking of revenue for the Iowa lines. The Commission, therefore, permitted the Fourth Section departure: "It is well established that the Commission may consider market competition."

[1] Rates on Sugar, 31 I. C. C. 511. See also the discussion of Cincinnati as a "pivotal point from the market standpoint between New Orleans and the East," the rate, though not the same, being "closely approximated." Sugar Rates from New Orleans, 31 I. C. C. 495, 499.

Essentially the same strategic situation was involved in Graham & Gila Co. Traffic Asso. *v.* A. E. R. R. Co., 40 I. C. C. 573; rates on explosives to El Paso from California, Colorado, and Kansas. The lines from the West were granted relief. In Western Cement Rates, the competitive situation involved Kansas City, St. Louis, principal markets, and producing plants in the Kansas gas belt, and near Dallas, Texas. To justify charging more to intermediate points in Oklahoma than to Texarkana, it was urged that the Kansas City-St. Louis rates to Texarkana were unduly low, being depressed by carrier competition through New Orleans and Shreveport and from the Dallas area plants. 48 I. C. C. 201, 259.

of supply, particularly of manufactured articles, stretch from the Missouri River to the Seaboard. The haul from East to West is through competing territories, and the farther sources of supply have the benefit of water competition. The interests of the rail carriers which may participate in the traffic are, moreover, divided; while they share the revenue on all rail business from, say New York, they are in position to exact larger divisions from points farther west. A movement of goods from Chicago to the Pacific Coast is "local" to the Santa Fé. It was the policy of the Chicago, St. Louis, and Twin Cities roads to place the business interests of Chicago, St. Louis, and the Missouri River Cities, and of St. Paul and Minneapolis in the Pacific Coast market upon equal terms with their seaboard competitors who might use the rail and water routes via the Gulf. Market competition favored an equalization, or blanket.

The Fourth Section problem arose out of the method of fixing rates to intermediate points in the intermountain territory. In 1910 these were made by the combination upon the nearest "terminal": the rate to Reno was the rate to Sacramento, plus the local back. On business from New York via the Sunset-Gulf line (boat to New Orleans or Galveston—rail to Reno) this did not mean a Fourth Section departure, although it did via the all rail route through Ogden. The result of the rate structure was to concentrate jobbing in the Pacific Coast cities—Seattle, Portland, San Francisco, to the detriment of such inland towns as Reno and Spokane. They complained, but were met with the argument which the Commission, until the war emergency, upheld: water competition compelled the long haul rates, and the revenue from higher intermediate rates was needed to secure sufficient income.[1] The real difficulty arose, not from the situation on business to the terminals, nor to intermediate points from New York, but on business to the intermediate intermountain territory from interior Eastern points, of which Chicago is typical. These also exceeded the rates to the terminal cities.

[1] Merchants' Union of Spokane *v.* U. P. R. R. Co., 5 I. C. C. 478; Maricopa County Com'l Club *v.* A. T. & S. F. Ry. Co., 9 I. C. C. 250; Business Men's League of St. Louis *v.* A. T. & S. F. Ry. Co., 9 I. C. C. 318; Spokane *v.* N. P. Ry. Co., 15 I. C. C. 376; 19 I. C. C. 162; 21 I. C. C. 400; Commodity Rates to Pacific Coast Terminals, 32 I. C. C. 611; 34 I. C. C. 13.

Water competition, effective through "market competition," was advanced as the basis for the discrimination. Only when water competition was eliminated during the war, were rates on the commodities peculiarly suitable for water carriage made the same at terminals and intermountain territory.[1] Class rates and rates on commodities not suitable for water carriage had previously been readjusted.

The Chicago carriers, it must be remembered, were seeking to place Chicago business interests on a parity with those of New York. There was no impelling pressure from Chicago interests to do more. Moreover, lower rates from Chicago to Reno than from New York would tend to keep the New York interests out of that market, affecting the traffic via the Sunset-Gulf lines and San Francisco, as well as the overland haul in which the Southern Pacific participated from Ogden. The Western Pacific had not then been completed. Unless readjustment was forced by regulation, no individual carrier was likely to attempt change. The Southern Pacific control of the only line to Reno, like the Hill System control of the Spokane situation, permitted enforcement of the consistent policy. Moreover, the Santa Fé, operating into San Francisco, but not into Reno, was favored by a rate structure which permitted it to carry goods to its terminal, and ultimately forwarded by San Francisco jobbers into Reno upon the same basis as the direct lines through Omaha or Kansas City and Ogden.[2]

§ 11. But competition merely constitutes a basis for granting permission to depart from the requirements of the long and short haul clause. Of itself it does not constitute a basis for measuring the extent to which relief may be granted. The Commission has consistently held that the extent of the Fourth Section violation should not exceed the "real necessities" of the controlling influence.[3] But in no case may rates depressed to meet competition

[1] Intermediate Rate Asso. *v.* Director General, 61 I. C. C. 226, and the cases there cited.

[2] The character of the readjustment directed by the Commission is discussed, below, Chapter XII.

[3] Emlenton Petroleum Rates, 29 I. C. C. 519, 521; see also Rates on Iron and Steel to the Pacific Coast: "It seems clear that ordinarily the Commission should not, by relief from the Fourth Section, authorize the carriers to go any further in meeting water competition than is necessary to meet the competition . . . because to do so would give a permanent advantage to some localities to the disadvantage of competing localities." 38

be so low as to burden intermediate traffic.[1] The act itself requires that the long haul rates shall be "reasonably compensatory." To determine when the long haul rate is not "reasonably compensatory" is at best a difficult task.[2] It may be fairly presumed that the railroad manager will not, as a general rule, solicit business to be carried at a net loss, unless the burden can be shifted to the intermediate traffic. And this alternative the Commission has sought to bar: the intermediate rates must be "reasonable." The power to fix minimum and absolute rates seems to insure adequate control over all elements of the complicated relative adjustment.

In the case of circuitous routes, the carriers have been refused permission to depart from the rule whenever the long line has been "excessively" or "unreasonably" circuitous. When rates were first lowered to Spokane, the Union Pacific voluntarily retired from the business.[3] The desire of the Pennsylvania to keep open routes via Chicago between St. Louis and the Ohio River cities, routes 200-300 per cent of the short line distance,

I. C. C. 237, 240. An increase in long haul rates was approved in the Southeastern Coal Case, although it was recognized that the higher rates might result in turning some of the rail business back to the water lines. Even the increased rate was found subnormal and therefore not unreasonable, *per se;* the carriers might, under these circumstances, fix the rates in accordance with their own best interests as they saw them. Coal & Coke Rates in the Southeast, 35 I. C. C. 187, 190.

[1] In the original Long and Short Haul Case, in re L. & N., 1 I. C. C. 31, the Commission said: "It may be impossible to make some portion of the traffic pay its equal proportion of the whole cost. If it can then be made to pay anything toward the cost above what the taking of it would add to the expense, the railroad ought not, in general, to be forced to reject it, since the surplus, under such circumstances would be profit. . . . The fact that long haul traffic will only bear certain rates is no reason for carrying it at less than cost at the expense of other traffic.

[2] In the Transcontinental Cases of 1922, the Commission considered the amended Fourth Section in some detail, saying, by way of summary, that "the words 'reasonably compensatory' imply that a rate properly so described must (1) cover and more than cover the extra or additional expenses incurred in handling the traffic to which it applies; (2) be no lower than necessary to meet existing competition; (3) not be so low as to threaten the extinction of legitimate competition by water carriers; and (4) not impose an undue burden on other traffic or jeopardize the appropriate return on the value of carrier property generally, as contemplated in section 15a of the act." The Commission then concluded "We also find that where carriers apply for relief from the long-and-short-haul clause of the fourth section and propose the application of rates which they designate as 'reasonably compensatory,' they should affirmatively show that the rates proposed conform to the criteria indicated above." 74 I. C. C. 48, 71.

[3] Spokane *v.* N. P. Ry. Co., 19 I. C. C. 162, 164.

was refused: "participation in this traffic can result in but little, if any, profit to these carriers, or benefit to the public."[1] Even the plea that the long route should be available in emergencies has been rejected.[2] No general maximum limitation has been set, however, the Commission rather leaving the responsibility with the carriers to refrain from continuing Fourth Section departures where the competition would be with lines one-half to one-third as long.[3] When the competition has been with water carriers, rates per ton mile have been examined and compared. These figures have been averages; but, from the nature of the case, no more conclusive figures are available.[4] In the Southeastern Class Rate Case, testimony presented by the carriers to the effect that any freight paying less than 3 mills per ton mile was looked upon by them "as perhaps paying less than the actual out of pocket expense" was accepted by the Commission.[5]

§ 12. Once the long haul rate has been fixed, there remains still the appraisal of the rate structure as a whole. This appraisal involves demonstration of the reasonableness, *per se*, of the intermediate rates, and of the reasonableness of the relation-

[1] Ohio River Case, 38 I. C. C. 411, 426.

[2] Drewes Sugar Co. *v.* S. P. Co., 44 I. C. C. 533, 541. The Texas & Pacific was here refused permission to keep open New Orleans to Houston routes (362 miles by the Southern Pacific), which were 166 and 231 per cent of the short line distance.

[3] Sugar Rates from New Orleans, 32 I. C. C. 606; cited and followed, Ohio River Case, 38 I. C. C. 411, 426. Other cases in which competition by unduly circuitous routes was refused recognition as a basis for relief are Oriental Textile Mills *v.* A. & V. Ry. Co., 48 I. C. C. 31, 38; Lookout Paint Mfg. Co. *v.* T. A. & G. Ry. Co., 49 I. C. C. 40, 42. Competition to Gulfport from New Orleans via the New Orleans & Northeastern, Hattiesburg, and the Gulf & Ship Island, 187 miles, as compared with a short line distance of 67 miles, was in the first cited case vigorously denounced as "absurd."

[4] Commodity Rates to Pacific Coast Terminals, 32 I. C. C. 611, 622.

[5] Fourth Section Violations in the Southeast, 30 I. C. C. 153, 175-7; at p. 187 it was said:

"It seems reasonable to conclude from the testimony offered in this case that these rates afford a revenue above the actual cost of handling the traffic, and the acceptance of such rates by the carriers must add something to their net revenues;" at p. 194: "It will be seen that the lowest of these class rates pays more than 1 cent per ton-mile for the distance hauled; and, without doubt, more than the additional cost of handling;" see also discussion, equally vague, pp. 208, 236, 252; especially p. 281: "There is nothing in the record to lead to the conclusion that any of the rates on either classes or commodities made to any of these . . . pay less than the additional cost of handling;" and, p. 318, the perfunctory statement, without supporting data: "They all without doubt pay more than the additional cost of handling."

ships of rates for long and for short hauls. Fundamentally the latter involves principles governing discrimination. In both analyses, however, comparison has been the usual tool. Distance is the essence of the long and short haul problem. There has been comparison with rates set by the Commission for similar distances in the same territory, or comparison with mileage tables established by the Commission, or compiled to show the "average practice."[1] Or, without establishing a complete mileage scale, maximum intermediate rates or differentials have been named.[2] In the case of commodity rates it has been specified that the rates to intermediate points should not exceed the rate on the same commodity to the more distant point by more than the difference between the rates on the class to which the commodity belonged.[3] In the Southern Cotton Case it was first held that the "short lines," if not parts of the direct route, might charge a through rate, based upon the junction point rate and 90 per cent of the short line local rate, a ruling subsequently modified (on a show of needed revenue) to permit charging the full combination.[4] Frequently it has been provided that existing intermediate rates might not be increased,[5] or that intermediate rates, while conforming to a general relationship prescribed, might not exceed rates proposed in the carrier applications and briefs.[6] Where the necessity of building the intermediate rates upon the theory of a back haul has been recognized, it has been urged that something less than the full local should be used as the "back haul" factor in building the rate, to give recognition to the fact that there is less cost of service in hauling the shorter distances. In the Transcontinental Commodity Rate Cases, moreover, it was urged that rates be established upon the theory

[1] Fourth Section Violations in the Southeast, 30 I. C. C. 153, 174; 32 I. C. C. 61, 63; Lehigh Portland Cement Co. *v.* B. & O. S. W. R.R. Co., 42 I. C. C. 406, 414; Houston *v.* A. T. & S. F. Ry. Co., 44 I. C. C. 349, 351; Freight Adjustment Steering Committee *v.* A. C. L. R. R. Co., 53 I. C. C. 506, 509.

[2] Sugar Rates from New Orleans, 31 I. C. C. 495, 510; Second Duluth Case, 46 I. C. C. 585, 593.

[3] Rates from New Orleans and Galveston, 44 I. C. C. 727, 737; Rates, C. F. A. Ty. and C. & O. Ry., 47 I. C. C. 576, 580.

[4] New Orleans Cotton Exchange *v.* L. & N. R. R. Co. 46 I. C. C. 712, 750; 49 I. C. C. 271, 278.

[5] Worden-Allen Co. *v.* C. M. & St. P. Ry. Co., 42 I. C. C. 362, 364; Second Duluth Case, 46 I. C. C. 585, 583.

[6] New Orleans Cotton Exch. *v.* L. & N. R. R. Co., 49 I. C. C. 271, 274.

that the proportion of freight hauled by rail direct should increase with the distance from the terminals.[1]

The provision of the Transportation Act of 1920 declaring that a circuitous route meeting the rates of direct line might not establish rates exceeding the junction point rates—except when the distance exceeded the short line distance between terminals,—automatically set up a maximum relative adjustment, when the competition is that of direct and circuitous rail routes. But when the competition is with water carriers, or with carriers serving an alternate source of supply, an appraisal of the competitive requirements must be made by the Commission. Even the circuitous route rule establishes only a maximum adjustment. The exact adjustment may be set by the Commission in the exercise of its rate making powers.

This is sound. Either the Commission must be the responsible body, with authority commensurate with that responsibility, or the logical alternative to the present flexible long and short haul clause should be adopted.[2] That there is this logical alternative, a rigid long and short haul requirement, should be frankly recognized when further amendments to the Act are proposed. Merely to carry into the Act rules of interpretation which the Commission has developed tends to make more rigid the exercise of discretion by that body. Laws regulating business are seldom liberalized. When, therefore, a body of interpretations can be built up which can be freely modified to meet changed conditions, the public will be protected, and private interests insured against violent changes in conditions governing the conduct of their business. Flexibility in the application of the rules is obtained without placing the detailed rates in the basic legislation. All that is required is confidence in the Commission—such confidence as is demanded unless the present scheme of regulation is abandoned.

[1] Commodity Rates to Pacific Coast Terminals, 32 I. C. C. 611, 631, 632.
[2] Transcontinental Cases of 1922, 74 I. C. C. 48, 68.

CHAPTER XII

GROUP RATE PRINCIPLES

§ 1. The establishment of rates on a group basis is an effective device for securing simplicity in tariff publication. To quote station to station rates for each of the 80,000 odd railroad stations in the United States would require masses of tables, which, from their very detail, would appall the average user of a railroad tariff. By standardizing the form of rate tables, and grouping points of origin or destination (or both), the work of tariff compilation and interpretation is much simplified. The number and volume of tariffs is cut down, and the application of rates is made apparent by assigning the towns taking the same rates to "Group A," "Group 1," by making reference to "Rate Table A," or "Rate Table 1," or by stating that the rates to a key town or city such as Chicago, Boston or New Orleans are applicable. Station lists frequently fill the larger part of the body of the tariff. The actual rate tables to which the indices of stations make reference are then compressed within a few pages at the end.[1]

The group rate device is, however, much more than a mere scheme for simplifying the work of rate publication. In its application, it serves to illustrate the practical bearings of the governing rate making principles previously demonstrated: the distance principle, the equalization principle, and the long and short haul principle. Its consideration in some detail, is, therefore, a summary of the workings of these principles as they have

[1] The rules of tariff publication governing these details are contained in the Commission's Tariff Circular 18-a, or revisions thereof.

affected actual rate making. There is a long standing doctrine of the Commission that "a place is entitled to its natural advantages."[1] Proximity to a source of supply or to a market constitutes one of the most obvious illustrations of natural advantage. A group rate, from the nature of the case, includes points at unequal distances upon the same rate basis. There would be contradiction, therefore, in an unqualified approval of the group rate device and, at the same time, insistence upon the rule that business men may not be deprived of the advantages of their location. There has, on this account, been no unqualified approval of the group rate device by the Commission. Under the law there could be none:

> "It is evident that every system of group rates must occasion more or less discrimination. The rate to the nearer edge . . . is of necessity discriminatory. This discrimination grows relatively more in proportion as the distance from the group decreases and plainly there must come a point when the point of origin is so near the group that the discrimination will become undue."[2]

It has been when the discriminations created in group rate adjustments have been alleged to be "undue," that the issue has come to the Commission for determination. It is the man just over the line who feels the sting. He pays higher rates than his competitor who has nearly the same haul, and as high rates as his competitor at the far boundary of his own group, the extent of the discrimination depending upon the amount of the total haul and of the length of the line included in the group.

§ 2. The application of the essential principles is well illustrated in the Natchez Case.[3] The so-called "Shreveport Triangle," shown by heavy black lines on the map, is the triangular area, the three corners of which are Shreveport, Monroe, and Alexandria. The grouping had its origin in the rates established by boat lines on the Red River to Alexandria and Shreveport, and on the Ouachita to Monroe in the early days before railroads were constructed in that section. Originally the

[1] Imperial Coal Co. *v.* P. & L. E. R. R. Co., 2 I. C. C. 618.

[2] Mitchell *v.* A. T. & S. F. Ry. Co., 12 I. C. C. 324. Similar language is found in S. W. Mo. Millers' Club *v.* M. K. & T. R. R. Co., 22 I. C. C. 722; Alpha Portland Cement Co. *v.* B. & O. R.R. Co., 22 I. C. C. 446, 449; Hammerschmidt & Franzen Co. *v.* C. & N. W. Ry. Co., 30 I. C. C. 71, 81, and in the Illinois Coal Cases, 32 I. C. C. 659.

[3] Natchez *v.* L. & A. Ry. Co., 52 I. C. C. 105.

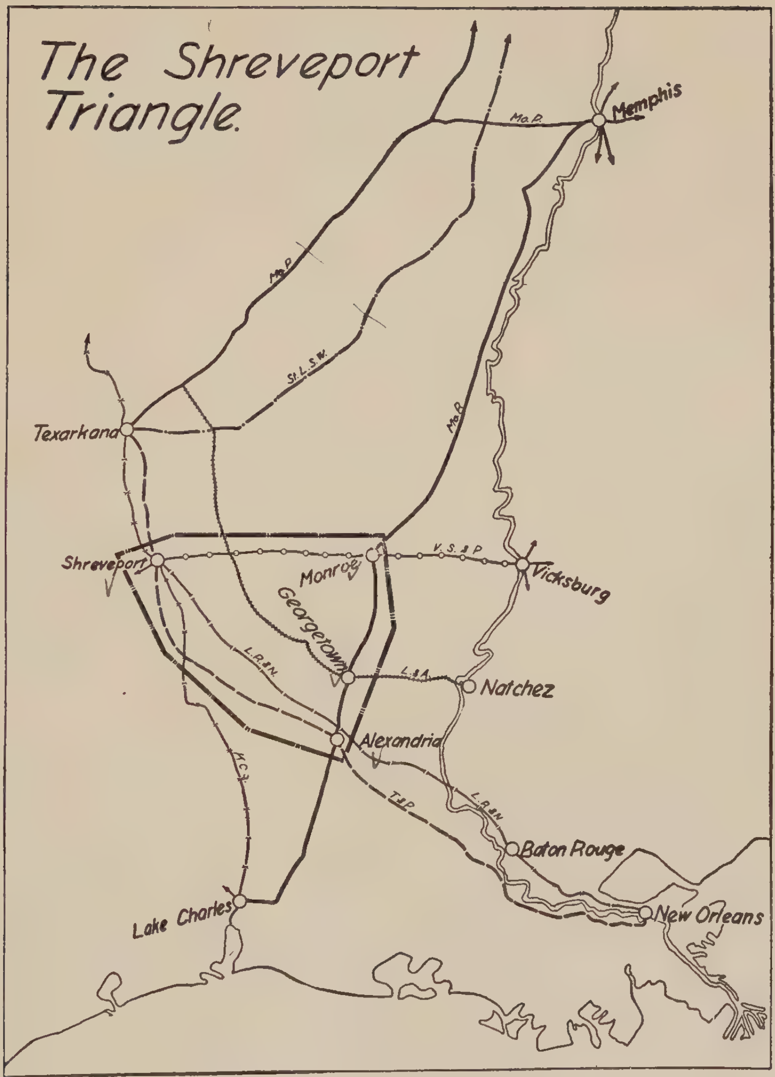

The Shreveport Triangle.
Memphis
Mo. P.
Mo. P.
St. L. S. W.
Texarkana
Mo. P.
Shreveport
Monroe
V. S. & P.
Vicksburg
Georgetown
L. R. & N.
L. & A.
Natchez
Alexandria
K. C. S.
T. & P.
L. R. & N.
Baton Rouge
New Orleans
Lake Charles

PLATE 11.

equalization had been confined to the three apex towns only, but readjustment in conformity with the long and short haul principle had blanketed rates at all points within the "triangle." [1] Rates from Memphis were established on the basis of the distance table prescribed for the average distance to the apex towns, 300 miles. To use the same grouping on business from Vicksburg, Natchez, and Baton Rouge, however, meant disregard of distance, which, in view of the short distance from these river towns to the nearest point in the group, was held to be "undue." From Vicksburg to Monroe the distance is only 76 miles, as compared with a distance to Shreveport of 173 miles; from Natchez to Georgetown, the nearest point in the group, the distance is 70 miles, to Shreveport the distance is 190 miles; from Baton Rouge the distance to Alexandria is 124 miles, to Shreveport 246 miles. The relationships, in terms of percentages, appear in the following table:

Vicksburg to Shreveport: 228% of distance to Monroe.
Natchez to Shreveport: 270% of distance to Georgetown.
Baton Rouge to Shreveport: 198% of distance to Alexandria.

Comparative data for Memphis show relationships as follows:

Memphis to Shreveport: 140% of distance to Monroe.
Memphis to Alexandria: 140% of distance to Monroe.
Memphis to Georgetown: 123% of distance to Monroe.

The holding of the Commission that this adjustment constituted an undue discrimination against the nearby river crossings reiterated the principle that "large blankets are justified for long distances which would not be for shorter distances." [2] The adjustment prescribed required that the rates be readjusted to conform with the distance principle, on a mileage scale basis. A corollary of the principle just stated is that the "groups main-

[1] This readjustment was in conformity with a Commission order. Memphis Freight Bureau *v.* St. L. I. M. & S. Ry. Co., 39 I. C. C. 224. The potential water competition was not accepted to justify the Fourth Section departures. Texarkana Freight Bureau *v.* St. L. I. M. & S. Ry. Co., 28 I. C. C. 569.

[2] Mutual Rice Trade & Dev. Asso. *v.* I. & G. N. R. R. Co., 23 I. C. C. 219, 224; quoted at p. 124, Natchez *v.* L. & A. Ry. Co., 52 I. C. C. 105, with Sawyer & Austin Lbr. Co. *v.* St. L. I. M. & S. Ry. Co., 21 I. C. C. 464, where the extension of a blanket adjustment of considerable breadth almost to the doors of an important consuming point was condemned; and Dallas Chamber of Commerce *v.* A. T. & S. F. Ry. Co., 40 I. C. C. 619, 637.

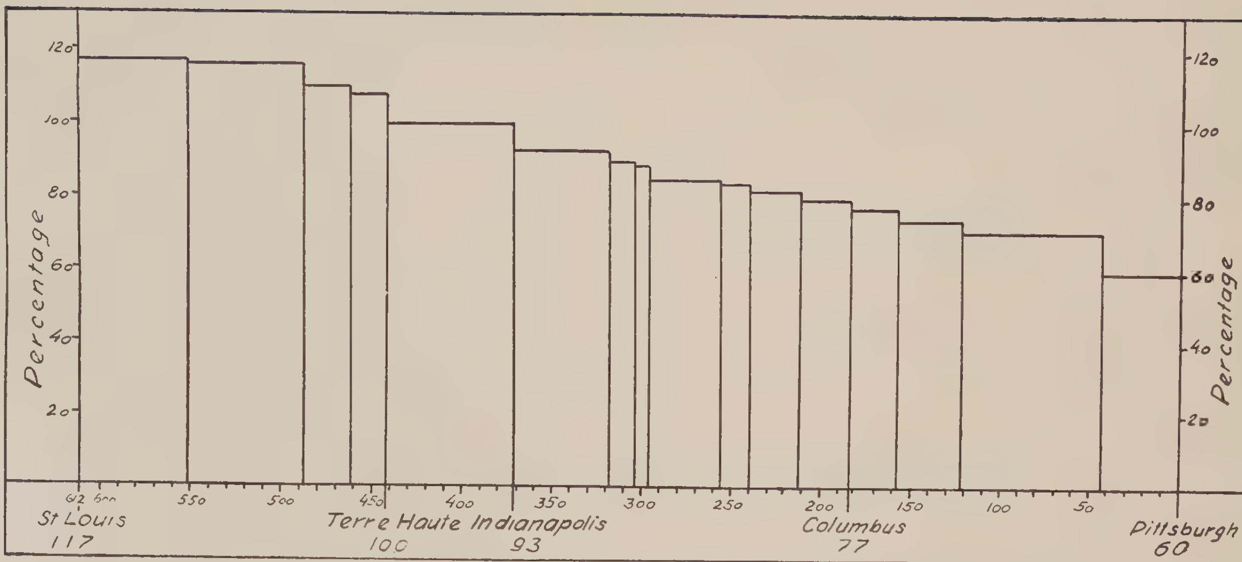


PLATE 12.—Width of Percentage Groups, Pennsylvania Railroad, Pittsburgh to St. Louis.

tained for shipments to more remote destinations generally are larger than the groups maintained for shipments to nearer destinations."[1]

The governing distance tables prescribed by the Commission conform to the "distance-group rate" principle. The C. F. A. class rate scale prescribed in 1917 is typical. Beginning with 5 mile "blocks," for the first 100 miles, the length of the blocks increases with distance: there are 10 mile blocks up to 300 miles, and 20 mile blocks up to 660 miles. Where a governing mileage scale has not been prescribed, but where competition and compromise have worked out the relative adjustment, the same tendency is apparent. In Ohio and Indiana on business to and from the territory east of the "Western Termini," the groups "run" north and south and are narrow as compared with the groups in Western Indiana and Illinois. Since the basic New York rates are fixed in terms of a percentage of the New York-Chicago rates, the actual rates need not be plotted to or from these "percentage groups." The greater width of the more distant groups is indicated very strikingly by tracing the percentages effective on the line of the Pennsylvania, Pittsburgh-St. Louis.

The west end groups effective on business to and from the Pacific Coast illustrate the same principles. When the class rates in effect from Chicago to San Francisco and intermediate territory via the Santa Fé, and to Seattle via the St. Paul are plotted in the now familiar fashion, it is seen that the curves in general conform to the distance table curves, illustrating the tapering principle. The greater width of the far west groups serves to "flatten" the curve.

§ 3. The distance principle is also given recognition in the typical group rate adjustments through picking out rates to or from one strategic point as the "base scale" and adjusting rates from all other groups, "differentials" over or under the base scale. No rate structure better illustrates this scheme for rate adjustment than that effective to and from points in Texas. Because the various advances in rates have served to bury the essential principles, the present explanation must first consider

[1] Hutchison Traffic Bureau *v.* A. T. & S. F. Ry. Co., 40 I. C. C. 160, 163.

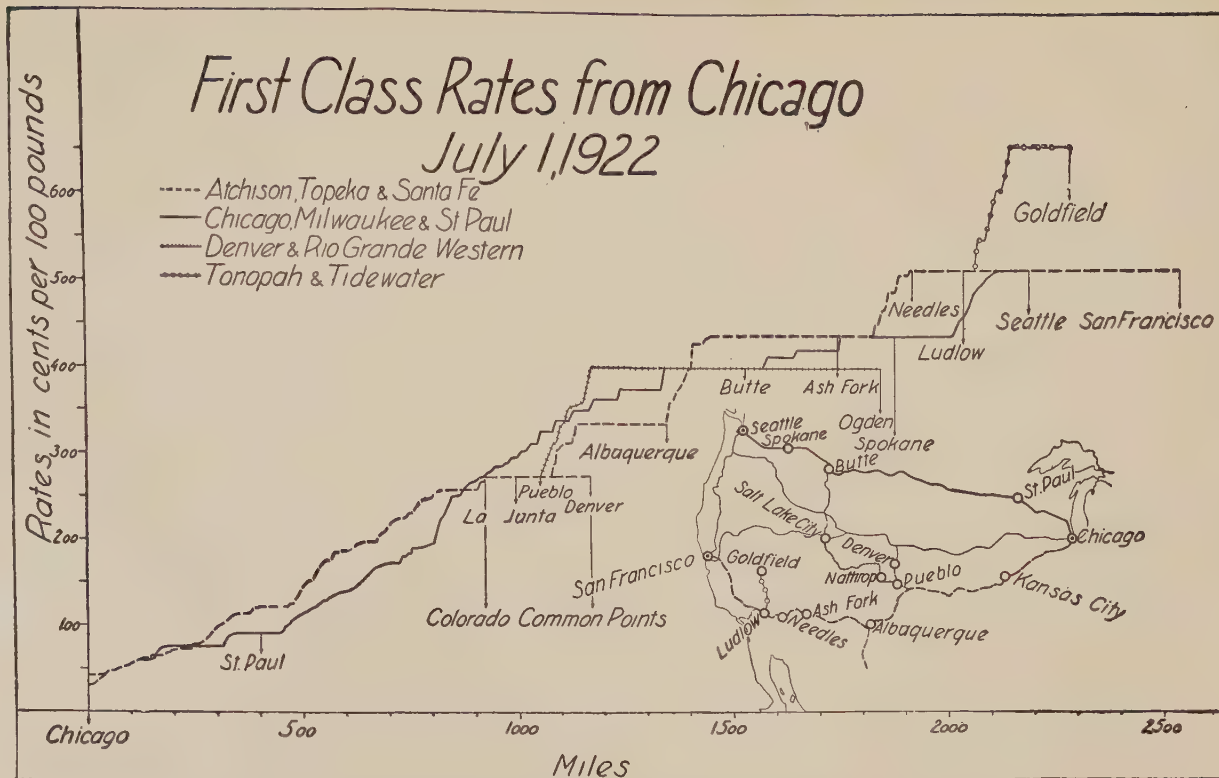


Plate 13.—Rate Structure.—Chicago to the Pacific Coast.

the situation as competition and compromise—rate wars and peace treaties—worked it out.

The Texas Common Point group is itself an illustration of the equalizing effects of competition. It embraces substantially all the thickly settled and cultivated portions of the state. It had its origin in the rivalry for traffic between the all rail lines entering the state through the northern and eastern gateways, and those entering the interior from the gulf coast. From the territory east of Pittsburgh the rail and water routes competed actively with the all-rail routes. The result of this competition, supplemented by further competition as new lines have been extended in western Texas, is a rate group extending a maximum distance of 500 miles north and south and 465 miles east and west. In general, all points in this group pay the same rate from or to a point in the United States on or east of the Missouri and Mississippi Rivers.[1] A St. Louis business man, for example, may ship to Corpus Christi on the Gulf for the same rate he pays to San Antonio, 150 miles less distant, or to Denison, on the northern border of Texas, 375 miles closer than San Antonio. A New York business man reaching the market through Galveston may ship to Denison or Ft. Worth for the rate which he pays to San Antonio or Waco.

The competitive tendency to extend the Common Point group was intensified by the frankly expressed policy of the Texas state authorities to protect local jobbers—the policy which led to the Shreveport Case. It was, moreover, the policy to create a number of jobbing centers scattered over the state, and to that end the state was divided into two intrastate rate adjustment areas: Common Point Territory and Differential Territory. These territories corresponded roughly (1) with the Common Point group as established for rates into and out of Texas, and

[1] In the Northern part of the state is a district to which, in accordance with the "distance-group rate" principle, rates from nearby territory are lower than to the rest of common point territory, Dallas Chamber of Commerce *v.* A. T. & S. F. Ry. Co., 40 I. C. C. 619. And Galveston and Houston enjoy specially low commodity rates because of the necessity to meet water competition from the Seaboard—a Fourth Section departure justified by water competition and "market competition." The Common Point Group is also important on Colorado business, although the rate groupings are slightly different, in accordance with the Commission's order, Public Utilities Commission of Colorado *v.* A. T. & S. F. Ry. Co., 52 I. C. C. 439, 453, which insisted upon a recognition of distance.

(2) Differential Territory: the Texas territory to which or from which interstate rates were made by adding published amounts to the Common Point rates. It was within the Common Point Territory that rates were prescribed on the mileage table basis, marked by the peculiarity that no increases were effective after a distance of 245 miles was reached. This meant, of course, that once a distance of 245 miles was reached all Texas jobbers, wherever located in the state, could compete on an equal basis, since all paid the same "in" rates. To points in Differential Territory, rates were calculated on the mileage table to a town on the border of Common Point Territory, the through rate being calculated by adding the established "differentials" to this amount.

Because the "Common Point Group" for inbound shipments, and the "Common Point Territory" in which the Texas Scale was applied, were not identical, the issue of discrimination arose when the "Panhandle" country was opened up. Amarillo was included in the territory paying the intrastate scale. But it paid "differential rates" (i. e. rates in excess of the Common Point rates) on merchandise inbound. The Texas Common Point Case of 1913 arose from the filing of tariffs by the carriers proposing to shrink the size of the Common Point group to equalize the competitive situation. The new tariffs, which left Amarillo rates alone, but advanced the rates at such competitive points as Sweetwater and Big Springs, were suspended, and, upon order of the Commission, withdrawn. The justice of the contention of the Amarillo interests was granted by the carriers, and recognized by the Commission. On the basis of distance they were entitled to Common Point rates. But, instead of shrinking the Common Point Group as proposed by the carriers, or expanding it to include Amarillo, a compromise was arranged. Special commodity rates on the articles sold through jobbers were provided, effecting an equalization of Amarillo and the Common Points to the extent that the competition had constituted a basis of complaint.[1]

Rates between Texas and the North and East are built upon the St. Louis rates as the "base scale." St. Louis is a strategic crossroads. The first through line into Texas from the North

[1] Texas Common Point Case, 26 I. C. C. 528.

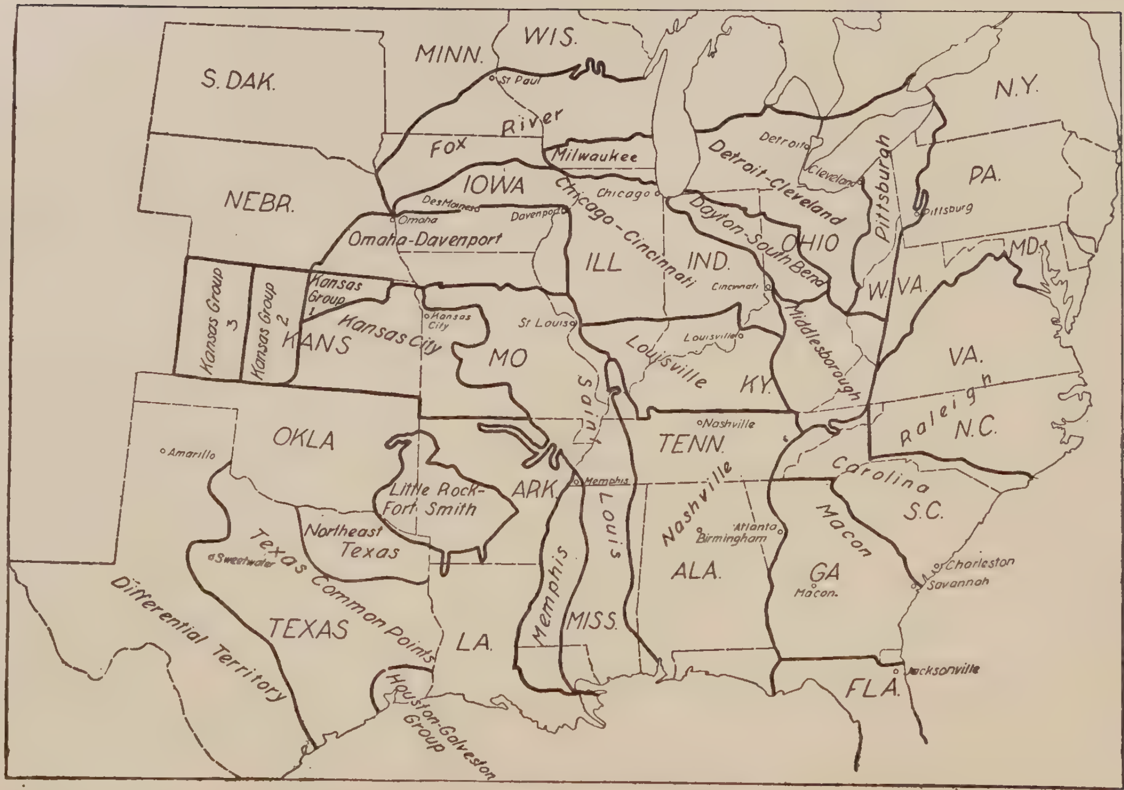


Plate 14.—The Texas Interstate Rate Groups.

was the Missouri, Kansas & Texas and its connections with St. Louis at Sedalia (Missouri Pacific), and Vinita (the original Atlantic & Pacific line of the present "Frisco" system). St. Louis is the principal rate breaking point, and railroads under new ownership extend into the South and West. The St. Louis "base scale" of class rate (and the commodity rate structure was built up on the same principles as the class rate structure), prior to the series of changes occasioned by changes in the rate level, was the following:

1	*2*	*3*	*4*	*5*
147	125	104	96	75

The rates to and from other groups were then determined by adding or subtracting the agreed differentials.[1] Thus the differentials effective on Chicago business were, on the first five classes, 20, 16, 12, 10, 7 cents over St. Louis, giving rates of 167, 141, 116, 106, 82 per 100 pounds. Higher differentials were added to the base rates to fix the scales at more distant groups. These rates were advanced during the emergency period and, in 1922, reduced with resultant changes in the rate relationships, though not in the rate structure. The old flat differences in rates have been destroyed, but the essential competitive relationships have been maintained. The total rates as published are graded upon the distance principle.

§ 4. The complex Lake Cargo Coal adjustment represents a similar recognition of the distance principle in the establishment of group rate differentials. In 1917, when the Commission made its comprehensive investigation, the rate structure illustrated on the map was found in effect. This was in part the result of a series of isolated opinions by the Commission: the Lake Cargo Case was to furnish the basis for a comprehensive revision looking at the situation as a whole.[2] In general the original group rates illustrate two essential principles of rate making: the

[1] The rates in this base scale were prescribed as maxima by the Commission in R. R. Com. of Tex. *v.* A. T. & S. F. Ry. Co., 20 I. C. C. 463, following an advance made in 1908, which increased the 1903 scale of 137, 121, 104, 96, 75 to 147, 129, 112, 102, 80. See also Class & Commodity Rates to Texas, 11 I. C. C. 238, for discussion of the 1903 advances.

[2] These various opinions are cited in Lake Cargo Coal Rates, 46 I. C. C. 159, 161. A typical case is that of Boileau *v.* P. & L. E. R. R. Co., 22 I. C. C. 640. Many of the contentions in the Lake Cargo Case appear in Bituminous Coal to C. F. A. Ty., 46 I. C. C. 66.

equalization principle, and the distance principle. The rates at the ports served by different carriers were equalized, as were the rates from certain of the producing areas. The problem of the Commission was to determine whether the differentials measured

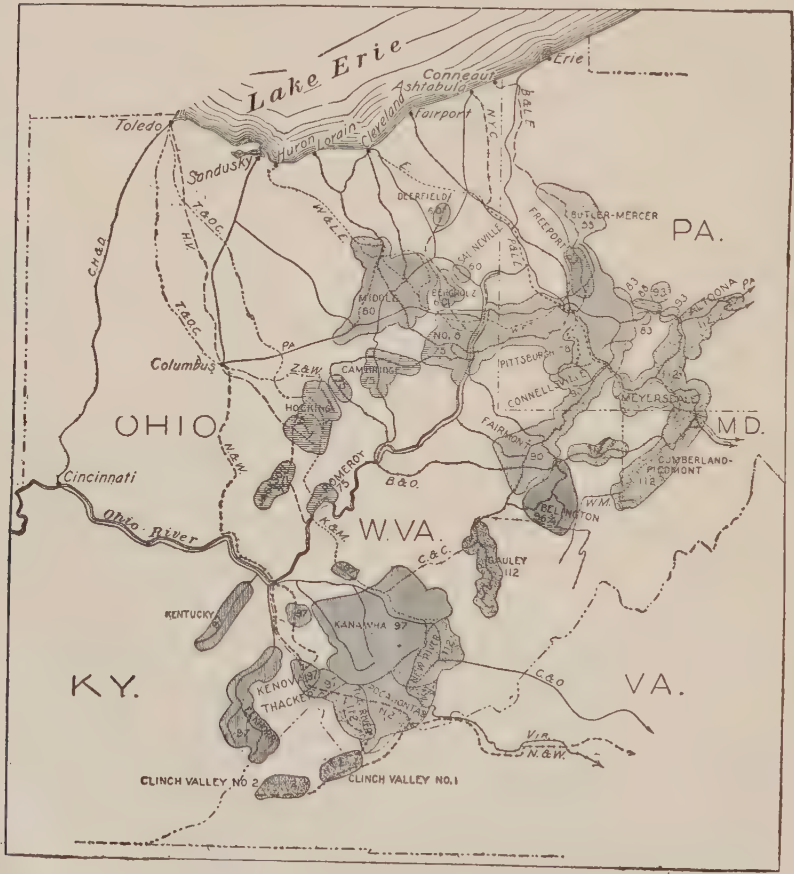


PLATE 15.—Lake Cargo Coal Groups.

the dissimilarity of conditions fairly, and whether the equalization was always warranted.

The following table shows the extent to which the decision of the Commission disturbed the old adjustment, using the Pittsburgh rates as base scales:

	Rates	Differentials Old	Differentials New	Rates, July 1, 1922
Pittsburgh	78	..	..	166
Ohio No. 8, Cambridge and Hocking Districts..	75	3c under	3c under	163
Connellsville	90	12c over	6c over	172
Fairmount	90	12c over	15c over	181
Altoona and Meyersdale..	112	24c over	22c over	188
Kanawha, Kenova-Thacker, and Kentucky	97	19c over	25c over	191
New River and Pocahontas	112	24c over	40c over	206

The new differentials sought to substitute a consideration of distance and transportation conditions (haul over expensive bridges, one line vs. two line hauls) for the original differentials which had been based largely on the kind and quality of coal, mining costs, and general market and commercial relationships: to substitute transportation considerations for commercial considerations.[1] In this fashion, some equalizations of competing fields, especially those in close proximity and producing similar grades of coal were permitted to stand. Others were broken up. The equalization of the ports was untouched. The differential relationship was not disturbed by the subsequent advance and reduction in rates. In the 1920 Increased Rate Case, the proposal of the carriers to continue the existing differentials was approved; in the 1922 Reduced Rate Case it was provided that "recognized rate relationships should be maintained."[2]

§ 5. The long and short haul principle in its relationship to group rates is next to be considered. In its simplest form, the problem is presented when a number of substantially parallel lines are cut by a line running at right angles to the main current of traffic. The cross line from C cutting the three "trunk lines" at S, T, and V, on the diagram used to illustrate "cross country" competition and equalization presents the essential strategic relationship.[3]

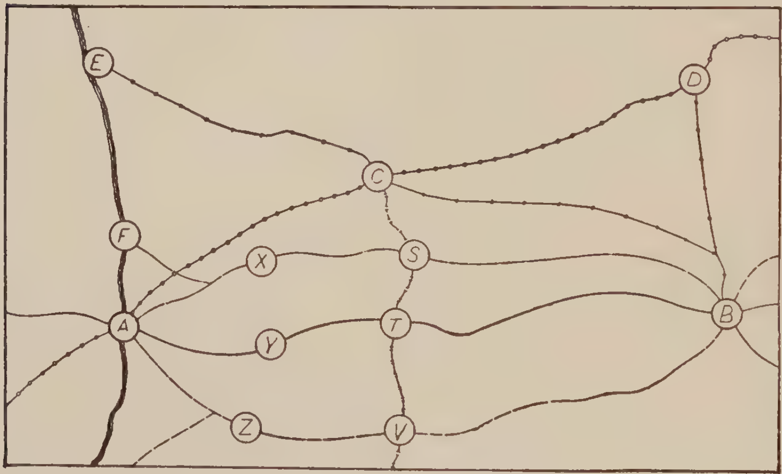
The existence of the cross line opens up a route via each of the trunk lines to each of the local towns. It will be to the interest of

[1] Lake Cargo Coal Rates, 46 I. C. C. 159, 185. The rates are the rates per ton of 2,000 pounds.

[2] Increased Rates, 1920, 58 I. C. C. 220, 244; Reduced Rates, 1922, 68 I. C. C. 676, 735.

[3] Above, p. 122.

the cross line to "work its line both ways," picking up freight at C in competition with the direct line and hauling it to S for interchange with the road A-S-B, or picking it up at S and hauling to V. The competition is one of circuitous routes, and unless the roundabout route is granted Fourth Section relief under the tentative 15 per cent rule (or is so weak financially as to call for special consideration), there can be no Fourth Section departures on the line between C and V.[1] The result of such competition has usually been the grouping of all points C to V inclu-



sive, on the rate basis set by the cross country competition. Typical illustrations of the long and short haul principle operating in this way are afforded on the Mississippi River, (where Muscatine is treated as a crossing, though it has no bridge), on the Missouri River, and at the Colorado and Utah Common Point groups. On the Missouri River, the lines on either side of the river, the Missouri Pacific and the Burlington, between Kansas City and Omaha, in Colorado, the Colorado & Southern from the crossing of the Union Pacific at Cheyenne to the crossing of the Santa Fé at Trinidad, paralleled for portions of the distance by the Union Pacific, the Rio Grande, and Santa Fé, and, in

[1] See, however, the discussion of the "short lines," above, p. 164, and the cases there cited.

Utah, both main lines connect the east-and-west through lines. Between Portland and Sacramento is a line of the Southern Pacific, which has been used in transcontinental competition with the direct route from the Salt Lake Basin.[1]

The same competitive relationships account for the north and south direction of the principal percentage groups in Central Freight Association territory.[2] The competitive influences were

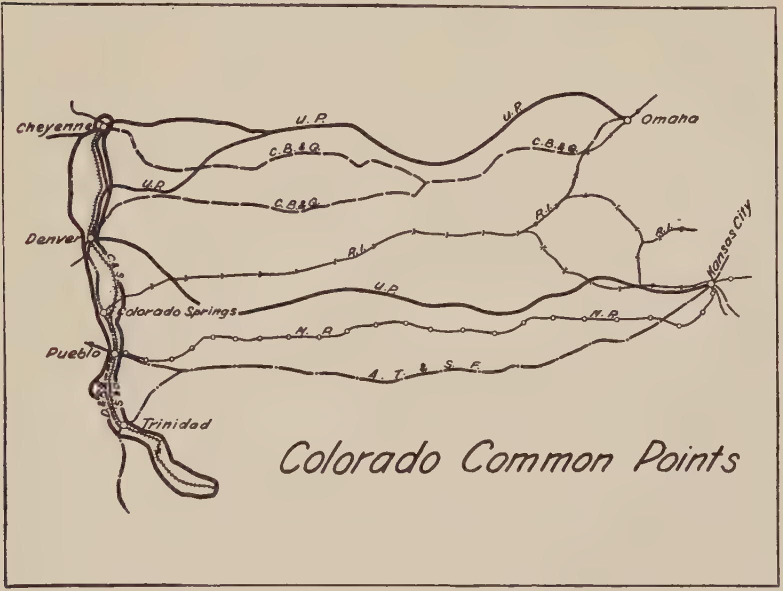


PLATE 16.

strongest in Ohio and Indiana. In Illinois and in Michigan, the number of cross lines was not important: in Illinois, the Illinois Central dominated the situation; and in Michigan, the north-and-south lines were really feeders of the through competitors without possibility of working their lines in both directions. In Illinois and Michigan, therefore, the groups have generally been larger, and the approximation to a rate basis fixed on mileage

[1] Competition via this route was one of the issues in the Union Pacific–Southern Pacific merger case.

[2] Pratt Lbr. Co. *v.* C. I. & L. Ry. Co., 10 I. C. C. 29; Michigan Percentage Cases, 47 I. C. C. 409, 421. The history of the 90 per cent group in Indiana illustrates very well the way in which the competitive influences operate to create this situation. The following table and the map give

much less close. The important cases in which the Commission has found it necessary to make minor adjustments in the groupings have, therefore, most usually arisen from competitive conditions in Illinois or Michigan.[1] The influence of the Monon

data essential for an understanding of the evolution of the present rate group:

Town	*Percentages* *1876*	*(Eastbound)* *1879*	*as* *1883*	*Assigned* *1887*	*in* *1922*
Cambridge City	85	88.5	90	90	90
Hagerstown	84	88	90	90	90
New Castle	85	88.5	90	90	90
Ft. Wayne	84	88	90	90	90
Waterloo	87	90	92	90	90
Butler	..	90	92	90	90
Auburn Jct.	..	90	92	90	90
Decatur	..	..	..	90	90
Muncie	..	..	..	90	90
Kendallville	..	90	92	92	92
Avilla	..	90	92	92	92
LaOtto	..	90	92	92	92

The important competitive influence which, in 1887, forced the creation of the group with its north-and-south extension was the ownership by the Lake Erie & Western of the cross line from Ft. Wayne to Connersville, the old Ft. Wayne, Muncie & Cincinnati, with which the main east-and-west line of the L. E. & W. from Sandusky connected at Muncie. It was in the interest of the L. E. & W. to operate this line both ways from Muncie, on traffic which it received at points east, and sometimes even to haul the full length of the line, traffic originated or interchanged at Ft. Wayne or at Cambridge City, its crossing with the St. Louis line of the Pennsylvania. Conformity with the requirement of the long and short haul clause forced a grouping of all stations on the line. The reduction of Butler and Waterloo to the 90 per cent basis in 1887 was due to the fact that they were intermediate to Ft. Wayne via the Lake Shore route which came into control of the old Ft. Wayne, Jackson & Saginaw. Decatur was intermediate to Ft. Wayne via the Erie. Previously the rates at local points had been calculated upon the basing point scheme: the through rates were effective only at the junctions, the rates at local points being the lower combination forward or backward. This had resulted in departures from the long and short haul principle abandoned in 1887 in this territory, although generally persisting in the South until 1916, and thereafter in exceptional cases. The 90 per cent basis was then, in the protection of revenues, carried east until the presence of other competitive points, frequently the result of more cross line competition, forced the creation of new groups. The exact shape and size of the latter would in turn depend upon the number of competitive points which had been established upon the same basis in 1883, and upon the presence or absence of a north and south line. Red Key remains on the 89 per cent basis—a relic of the old basing point adjustment.

[1] For history of the Illinois adjustment, see the Mississippi River Case, 28 I. C. C. 47, 29 I. C. C. 530; Elgin Com'l Club *v.* B. & M. R. R., 28 I. C. C. 380; Springfield *v.* Penn R. R. Co., 28 I. C. C. 511; Fox River Valley Mfrs. Asso. *v.* M. C. R. R. Co., 32 I. C. C. 547; Chamber of Com. of Freeport *v.* C. M. & St. P. Ry. Co., 33 I. C. C. 673. For history of the Michigan adjustment, see Michigan Percentage Cases, 47 I. C. C. 409. The principle that one readjustment frequently creates a new discrimination is well illustrated by subsequent history: see South Bend Chamber of Commerce *v.* Director General, 57 I. C. C. 215.

(Chicago, Indianapolis & Louisville) is seen in the equalization of Chicago and Louisville, and all points on the Chicago-Louisville line, on the 100 per cent basis; and the "back door" entrance of the "Soo Line" into Milwaukee accounts for the carrying of the 100 per cent basis at points on the old Wisconsin Central west of Milwaukee. When the "cross lake" routes equalized the Chicago rates at Milwaukee, the direct lines via Chicago had met the competition and had blanketed the rates at intermediate points.[1] The car ferry routes have, however, been permitted to charge more at intermediate points in Michigan than at the west bank ports.[2]

This rate structure has been called a distance tariff.[3] In its origins, and still, as considered for New York alone, it bears a very real relationship to a distance basis; but in its present condition, it is rather a typical group rate structure than a rate structure based strictly upon distance. The peculiarity is that the relations between the groups are expressed in terms of percentages of the New York-Chicago rates, rather than by fixed differentials, as in other group rate structures, such as, for example, the Texas rate structure.

The reason for the failure to mark the percentage adjustment as essentially a group rate structure rather than as a distance tariff lies in the fact that, in 1879, the carriers advanced rates from points in Indiana and Ohio by a "distance principle" calculation. In 1876 an eastbound percentage basis had been established, using the New York-Chicago mileage of the Pennsylvania, 920 miles, as 100 per cent, the other important junction points being assigned the percentage which their distance to New

[1] The Monon problem is discussed in the Supplemental South Bend Case, 61 I. C. C. 67; the car ferry competition in the Wisconsin Rate Cases, 44 I. C. C. 602, 637.

[2] Fourth Section Departures, Lake Michigan Ports, 57 I. C. C. 418, 422. Here the Commission says: "Cadillac would not be satisfied to have the Fourth Section departures removed by increasing the rates to and from the west-bank points; what it desires is a reduction of its basis to 100 per cent. . . . The reduction of Cadillac's percentage to 100 on all classes and commodities would tend to break down the whole rate adjustment in the northern part of the lower peninsula."

In C. F. A. Class Scale Case, 46 I. C. C. 475, 477, the carriers to and from Buffalo had been permitted to continue rates lower from and to the west bank ports than from or to the east bank ports, Ludington and Frankfort, intermediate on the car ferry routes.

[3] W. Z. Ripley, *Railroads, Rates and Regulation*, Chapter X, "The Trunk Line Rate System; a Distance Tariff," p. 356.

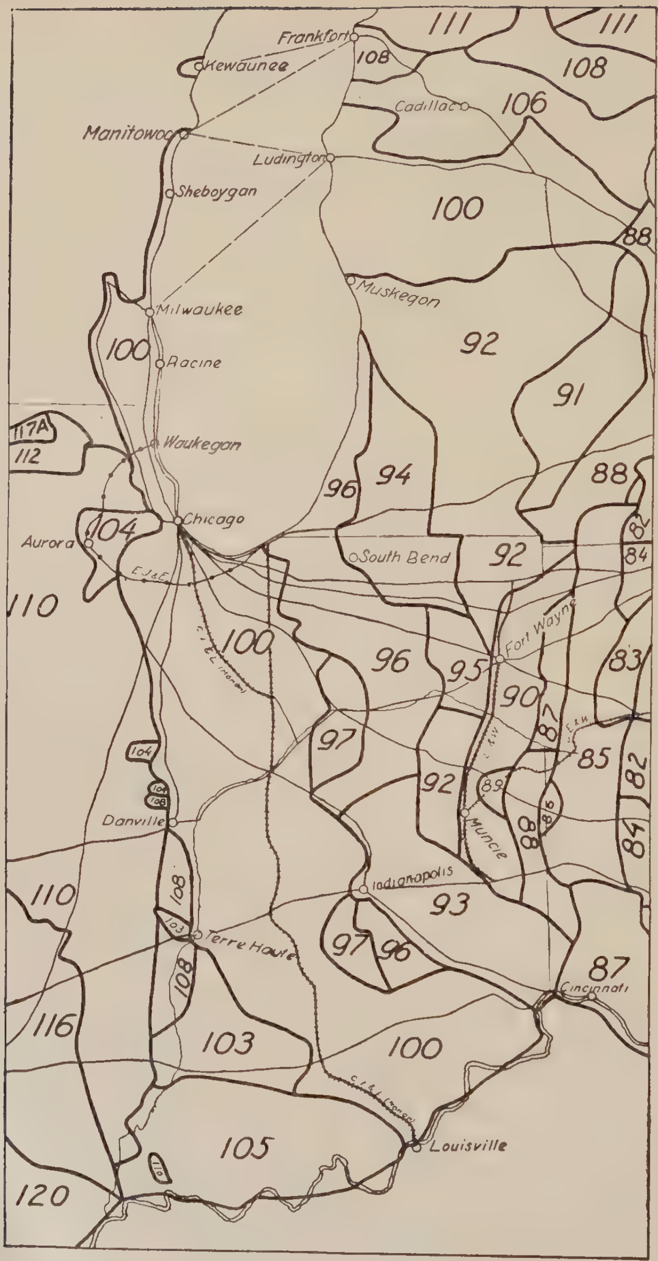


PLATE 17.—Percentage Groups.

York bore to 920 miles. Distances from points not on the Pennsylvania were figured on the combination through the nearest Pennsylvania junction. The actual rates then published were the distance percentages of the New York-Chicago rates. In 1879, the roads sought to secure additional revenue by advancing the eastbound rate bases (and through this device advancing the rates) from points taking less than 100 per cent of the base scale.

A "percentage formula" was developed. The formula provided that 6 cents per 100 pounds be deducted from an assumed rate of 25 cents per 100 pounds, Chicago to New York, this deduction representing fixed charges at both ends of long or short hauls. The remainder, 19 cents, was then divided by the New York-Chicago distance, 920 miles, to give the "mileage factor," .0206 cents. To determine the percentage status of any "common point," the distance via the Pennsylvania lines to New York was multiplied by this factor, the product added to the 6 cent "terminal charge" and this sum divided by 25. Thus, Xenia, Ohio, a 76 per cent point on the straight mileage basis became an 82 per cent point: its distance, 700 miles, gave a haulage factor of 14.42 cents; and adding the terminal charge of 6 cents, this created a total of 20.40 cents, 81.7 per cent of 25 cents. The relative increase was, of course, proportionately greater as the eastern boundary of Percentage Territory was approached; and lesser as 100 per cent points were approached. The formula was not applied at points taking more than 100 per cent of the New York-Chicago rates, since to have done so would have resulted in net reductions; nor did it apply westbound. In its application, the result was to develop scales of rates at junction points which conformed to the tapering principle. The percentage rates did not, however, apply at intermediate points, where, on the contrary, the lowest combination on any one of the nearby junction points was effective. But the distance between junction points was considerable, and the "percentage formula" was much more a scheme for getting revenue than for developing rate bases. Subsequently other basing points were arbitrarily assigned the same percentage basis as those calculated on the formula, in order to give recognition to cross-country competition when new lines were pushed through to Chicago. Groups of basing points were created. With the passage of the Interstate Commerce Act, the system of estab-

lishing rates at intermediate points on the combination basis was abolished, and the group system existing today was established. Such minor changes as have since been made by order of the Commission have sought to eliminate especially those discriminations due to the large size of groups. In essentials the rate structure is as it was established on the group basis in 1887.

§ 6. The new Southern rate structure, which is in process of development, illustrates also the evolution of a group rate system conforming in essentials to the distance principle. Prior to 1916, through rates in the South were published usually at the common points, or railroad junctions, and, at points intermediate, were calculated on the basis of the lowest combination. This was known as the Southern Basing Point System.[1] On the line of the Nashville, Chattanooga & St. Louis to Atlanta, for example, combination class rates were effective from Louisville as follows:

	1	*2*	*3*	*4*	*5*	*6*
Chattanooga	74	60	53	44	38	29
Tunnel Hill	94	81	72	61	52	40
Rocky Face	96	83	74	63	53	41
Dalton	97	84	75	63	52	41
Tilton	99	86	77	65	55	42
Resaca	102	89	79	67	57	43
Calhoun & McDaniels	103	90	80	68	57	43
Adairsville	106	93	82	70	58	44
Halls & Cement	108	95	83	71	59	45
Kingston	109	96	84	72	59	45
Cass & Rogers	110	95	85	71	59	46
Cartersville	98	87	78	63	52	41
Emerson	110	98	87	71	59	47
Allatoona	114	99	87	73	61	47
Acworth	116	102	90	75	62	48
Kenesaw	118	102	90	75	62	48
Marietta	106	87	78	63	58	50
Smyrna	116	103	93	75	63	50
Vinings	114	101	91	73	61	49
Bolton	110	98	88	71	59	47
Atlanta	98	87	78	63	52	41

Because of the general use of "any-quantity" rates it was possible for the line from the West to maintain the trade of

[1] The scheme of rate making which existed in the South prior to 1916 is explained in detail, Fourth Section Violations in the Southeast, 30 I. C. C. 153.

the Ohio River towns (on which they could control the long haul) in competition with jobbing interests located in the Southern cities, which could draw upon the Eastern seaboard for supplies in the transportation of which the Western lines could have no part. On business to the jobbing centers, through which, in an agricultural country, the bulk of the high class merchandise must flow, the aim was essentially to secure an equilibrium which would place goods from the Middle West into the hands of Southern distributors. The Western roads soon lined up with the distributing interests not located on a navigable stream. As far back as 1887, Mr. J. M. Culp, then General Freight Agent of the Louisville & Nashville, stated the basis of the competitive situation in clear language:

"Q. As a practical railroad man, would you not consider it a part of your duty to undertake to protect the business on the line of your road, whether terminal or local, against the competition of markets or cities located on other lines of roads or rivers? . . .

"A. That has always been the rule.

"Q. If one point should be favored with water competition, and there was a line of railroad existing to another point, you would so adjust its rates to that point as to enable it, if it could, in reason, to undertake to compete with that point for business, being interested in building up its own, rather than a distant city?

"A. Yes, sir."[1]

Thus both river landings where competition by water, real or potential, was met and railroad junctions became basing points. The Western lines (those extending into the South from the Ohio River) in general found it to their advantage to place such cities as Atlanta and Birmingham upon substantially the same rate basis as nearby competitive river points such as Augusta or Montgomery, fixing the rate on a level, compromised in the case of Atlanta, by equalizing the Baltimore rail-and-water and Ohio River scales.

The competitive towns which became basing points developed as local jobbing centers serving the territory in their immediate vicinity on the same basis as the Ohio River towns (or the Eastern port cities) if rates were on the any-quantity basis, and, at an advantage, when they possessed carload rates inbound. Undoubtedly there were instances where the interests of the car-

[1] Testimony, original long and short haul hearing, 1 I. C. R. 76, 96.

riers did not enforce the extension of basing point rates to all junction points similarly circumstanced; and yet, on the whole, the self-interest of the carriers, especially during the period of competitive building in the late 80's, caused equalizations very widely. The Atlanta basis of rates was effective at many of the jobbing centers. The commercial interests were in general equilibrium. And the Interstate Commerce Commission, even before the long and short haul rule placed the basing point rate structure in questionable legal position, occasionally ordered an equalization of the rates at junction points where transportation conditions were the same.[1]

In 1916, the first revolutionary step was taken when the carriers were refused permission to depress rates at railroad junctions or to equalize such competitive points on a depressed basis, while charging the combination of locals at intermediate points. The interest of the lines from the Ohio River in upholding this system has previously been remarked. In 1914, the carriers, both from the Ohio River and from Norfolk to the South Atlantic and Gulf ports, were permitted by the Commission's order to depress their rates only at the ports and at such towns on navigable rivers as Augusta, Macon and Montgomery, while holding up rates at interior points. In 1916 the first tariffs were published. A hybrid scheme for calculating rates was worked out: the Atlanta scale was fixed as a maximum for all intermediate points, and was blanketed back until it met the long established Carolina group on the lines from the East and a scale of distance maxima fixed in the general Southeastern Case on the lines from Chattanooga. The territory between Atlanta and the ports was then divided into rate groups wherever the combination on the port did not make less. Where the combination on the port did make less than group rates, rates were published which were the sum of the rate to the port, plus the rate back. In most instances, for the towns close to the port cities, the adjustment of

[1] Chamber of Commerce of Ashburn *v.* G. S. & F. Ry. Co., 23 I. C. C. 140; in Board of Trade of Carrollton *v.* C. of G. Ry. Co., 28 I. C. C. 154, is an extended discussion of the governing geographical conditions as affecting competition. Competitive points on the Atlanta, Birmingham & Atlantic, newly built, sought equalizations with points at which the A. B. & A. had met lower rates already established by competing lines: Vienna, 28 I. C. C. 173; LaGrange, p. 178; Montezuma, p. 280; Douglas, p. 445. The Douglas case contains an illustrative map, p. 449, showing the territory and the competing lines between Brunswick and Atlanta and Birmingham.

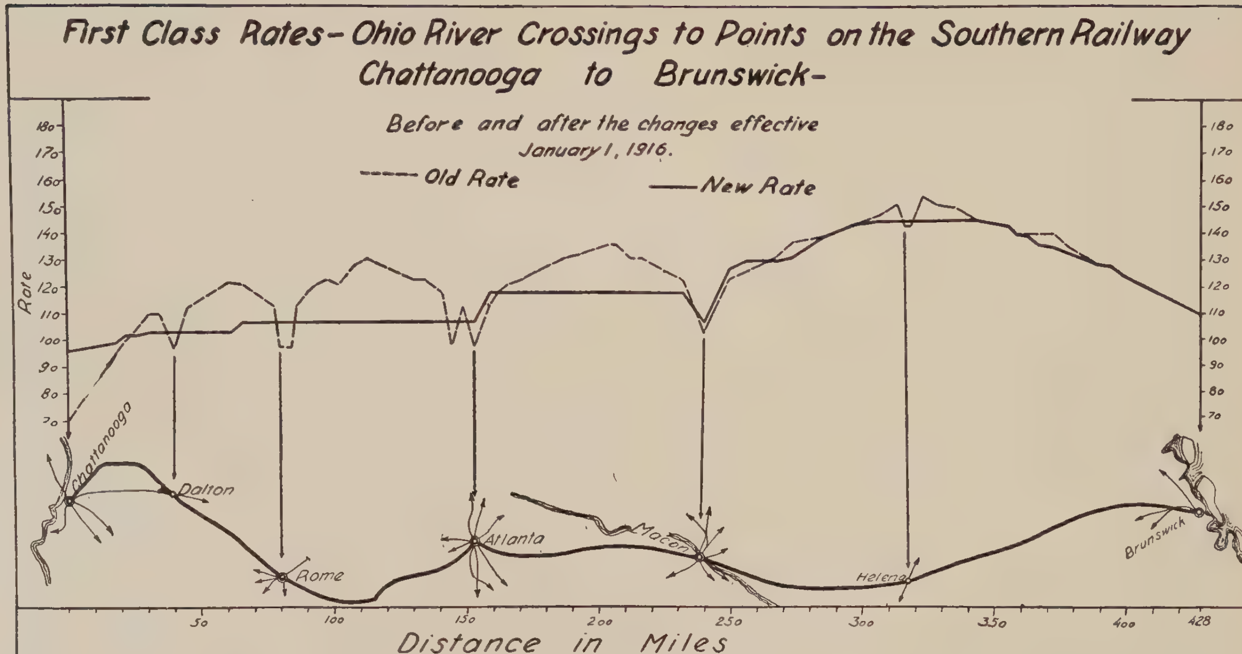

First Class Rates - Ohio River Crossings to Points on the Southern Railway
Chattanooga to Brunswick -
Before and after the changes effective
January 1, 1916.
Old Rate
New Rate
Rate
180
170
160
150
140
130
120
110
100
90
80
70
Chattanooga
Dalton
Rome
Atlanta
Macon
Helena
Brunswick
50
100
150
200
250
300
350
400
428
Distance in Miles

PLATE 18.

rates was, therefore, not changed since the port rates and the local rates were left untouched. The carriers were also allowed to depress their rates at river landings upon substantially the old basis, and were merely required to charge no more at intermediate points than at railroad junctions beyond. Where there was no water competition, this meant rate groups. The diagram which plots the Cincinnati 1st class rates on the Southern Railway from Chattanooga to Brunswick, both before and after the Commission's order had been obeyed, illustrates the 1916 method of treatment. The ruling that potential water competition may no longer justify Fourth Section relief, as carried into the law, has resulted in an order requiring higher rates at the Gulf ports than at intermediate points on business from or to the East, and higher rates at both the river points, such as Macon and at South Atlantic ports such as Brunswick on business from or to the Ohio River. The new adjustment thus required means development of a group rate structure, conforming in essentials to the distance principle.[1]

§ 7. The long and short haul principle also find frequent illustrations in the rate structure when rates at terminals or important competitive points are "carried as maxima," without grading the rates at intermediate points. When the lines from Hampton Roads, the Norfolk & Western and Chesapeake & Ohio built into Columbus and Cincinnati they published rates at intermediate points on the basis they found at their new terminals: the 77 per cent basis at Columbus, the 87 per cent basis at Cincinnati. On New York, Philadelphia and Baltimore business, where they participate only as circuitous lines, however, higher rates were charged at points between Kenova or Huntington (87 per cent, now 82 per cent) and Columbus (77 per cent).[2] The Virginia Cities group is also the result of the blanketing policy in which the Chesapeake & Ohio took the lead. This

[1] The governing opinions are Fourth Section Violations in the Southeast, 30 I. C. C. 153, and, on the law as amended: Rates to and from Nashville, 61 I. C. C. 308; Rates to, from and between points South of the Ohio River, Class Rates, 64 I. C. C. 107; Commodity Rates, 64 I. C. C. 306.

[2] As a result of the Commission's opinions in cases brought by Ohio River towns, notably Portsmouth and Huntington, the old 87 per cent group has been divided, the towns on and east of the Columbus lines of the N. & W. and C. & O. being assigned to a new 82 per cent group. Jobbers & Mnfrs. Bureau, Huntington, *v.* A. C. R. R. Co., 57 I. C. C. 64; Board of Trade of Portsmouth *v.* A. C. R. R. Co., 57 I. C. C. 78.

group has an east and west extension of some 300 miles.[1] When required to readjust their rates to Nashville, because the validity of potential water competition was denied as a basis for Fourth Section relief, the carriers fixed a Nashville rate, and carried this back as a maximum, thus creating a Nashville group.[2] The "flattening" of the rates on the Santa Fé east of Denver illustrates an application of the same principle.

§ 8. The transcontinental rate structure carries some interesting applications of the maximum principle. Eastbound on commodities there is the "postage stamp" adjustment—a blanket reaching from the Atlantic Seaboard to the base of the Rocky Mountains. Pacific Coast fruits have been given rates which they will bear to the dense consuming market, and this rate has been carried back throughout the Eastern half of the United States. The justification of the low rate at the Seaboard is the necessity to meet eastern and foreign competition: competition which becomes less as the market is found away from the Seaboard. The same wide blanket applies on the other staples of Pacific Coast production, lumber, wool, and canned fish, as applies on citrus, deciduous and dried fruits, or on canned goods. The rate structure conduces to a free distribution of the products, and to a substantially equalized price.[3] Against it there have been few complaints.[4]

It is the westbound transcontinental adjustment which has furnished the fireworks. The original Fourth Section order of the Interstate Commerce Commission divided the United States into five zones, which were subsequently modified in details to conform with the east end rate groups:

I. The territory west of the Missouri River, and the line of the Kansas City Southern to the Gulf.

II. The territory between the Missouri and (roughly) a line drawn north and south just east of Chicago.

[1] It includes the main line of the N. & W., Norfolk to Roanoke, 260 miles, and of the C. & O., Newport News to Hinton, 350 miles. See Bluefield Shippers' Asso. *v.* P. C. C. & St. L. Ry. Co., 22 I. C. C. 519.

[2] The order of the Commission was contained in its opinion in Murfreesboro Board of Trade *v.* L. & N. R. R. Co., 55 I. C. C. 648.

[3] It is the blanket rate, plus a reconsignment privilege, plus organization, which has made the marketing machinery of the California Fruit Growers' Exchange so effective.

[4] Intermediate Rate Asso. *v.* Director General, 61 I. C. C. 226.

III. The remaining territory north of the Ohio and west of the Buffalo-Pittsburgh-Kenova line.
IV. Trunk Line-New England territory, including Northern Virginia.
V. The remaining parts of the South.

Based upon these zones the following relative commodity rate adjustment was prescribed: rates to Spokane and Reno (typical of the complaining intermountain territory) might not exceed the terminal rates from Zone I; from Zones II, III, and V, higher rates to the intermountain points might be charged—not to exceed 7 per cent from Zone II, 15 per cent from Zone III, 25 per cent from Zone IV. To the terminal cities, the blanket rate equalizing the transportation costs for all producers was not disturbed. The result was a relative adjustment of rates illustrated by the following percentages:

From	*To Terminals*	*Intermountain Ty.*
New York (IV)	100	125
Pittsburgh (III)	100	115
Chicago (II)	100	107
Omaha (I)	100	100

The probable extent of the water competition was the determining factor in fixing the percentage relationships.[1] The traffic developments after the opening of the Panama Canal led to further extension of relief; an extension involving Fourth Section departures from the Missouri River, and a widening of the differential from Zones II, III, and IV on commodities peculiarly fitted for water competition. But the maximum intermediate rates were definitely fixed, and the terminal rates were made effective only at the ports of call. This was early in 1915; shortly after, slides closed the canal, and, when it was again open, the profitableness of the Trans-Atlantic service had diverted the shipping. The intermountain interests at once showed that the water competition was non-existent, and the Commission declined to continue Fourth Section relief. In revising their rates, the carriers generally advanced the terminal rates, creating a blanket extending over the whole coast. The same rate applied

[1] "We were of the opinion that as the Atlantic Ocean was approached, the effect of water competition became stronger, and there might be some excuse for slightly higher rates from Group II to intermediate points, and that this difference might increase until the fourth group was reached." 25th Annual Report I. C. C. (1911), p. 40.

at San Francisco as at Reno 250 miles east; at Seattle, as at Spokane, 400 miles east. In thus conforming with the Fourth Section the carriers created west end groups so large that the intermediate territory organized to attack the adjustment as unduly discriminatory. The Commission in 1921 refused to interfere with the new adjustment: the rates were found not to be "unreasonable, unjustly prejudicial or otherwise unlawful." [1]

This holding is in line with the generally conservative attitude of the Commission: one of hesitation to interfere with the mechanical construction of the rate structures created by the carriers. The Commission is charged by law with consideration of the rate level. This is a problem of broad general importance: essentially a problem of public policy. But carrier competition and coöperation have built up rate structures to meet the needs of economic provinces. The boundaries of the various rate groups correspondingly reflect the result of this struggle. The Commission policy that only when the rate groups are unduly large or constructed on illogical principles will the authority of the Commission be exercised to break them up is sound. Any other policy would mean a break down of the regulatory machinery. The issue coming to the Commission has had to do with the relative adjustment between groups, or between competitive towns rather than with the size or shape of the groups, and this issue has been met squarely. New rate scales have been established, or differentials provided. But when the carriers' rate groups have been established with a "reasonable" regard to distance, to the existence of cross lines, or natural boundaries such as rivers, whose presence affects the "cross country" competition, the Commission policy has been to let the rate structure alone, even when the actual rates have been condemned.[2] The fixing of rates to be fitted onto that structure, has been done in conformity with the rate making principles; usually, it should be frankly stated, with emphasis upon distance. The distance yard stick is too tempting for any regulatory body to put aside.

[1] Intermediate Rate Asso. *v.* Director General, 61 I. C. C. 226; Transcontinental Cases of 1922, 74 I. C. C. 48, 52.

[2] The division in Kansas on business into Texas, the dividing line being a meridian of longitude, is unusual. In Central Kansas there is a lack of north and south lines, and no basis for a competitive "cross haul."

PART III

SERVICE

CHAPTER XIII

THE SERVICE OBLIGATION

§ 1. The general principles governing the service obligation impose no hardship on the railroad. To furnish service is its business, its only source of income. The railroad, as a manufacturing industry, produces ton miles and passenger miles, together with ancillary services. Its plant can be utilized in no other way. Railroad service and the railroad rate or charge necessarily, therefore, have important relations to each other: a service is performed for a charge, and a charge is made for the performance of a service, or a series of related services.[1] It follows as a consequence of this close interdependence of service performance and rates charged that principles developed to govern the regulation of rates must be carried over into the field of service regulation. There should be equal treatment when conditions are substantially similar (and this is simply one way of saying that the performance of a different amount or character of service for competing shippers shall not be a cloak to conceal unjust discrimination), and service should be performed by railroad companies only in conformity with their general offer to perform it openly and for all shippers as announced in their published tariffs. Further essential principles govern the service obligation. These bear upon the character of performance and are not related to the problem of a reasonable and non-discriminatory charge. These principles are three: service must be adequate; it must be safe; and it must be continuous,—principles patently related.

[1] Nat'l Wholesale Lbr. Dealers' Asso. *v.* A. C. L. R.R. Co., 14 I. C. C. 154.

Before 1906, the common law obligation rested upon the railroads to furnish service—an obligation based upon the function of the common carrier. The Hepburn Act of 1906, however, did more than merely reiterate this common law obligation in general terms when, after defining the term "transportation" in Section 1, to include "all service in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported," it provided:

> "It shall be the duty of every carrier subject to the provisions of this Act, to provide and furnish such transportation upon reasonable request therefor, and to establish through routes and just and reasonable rates applicable thereto."

A carrier might no longer with finality plead that, as to certain classes of traffic, its common carriage function did not extend; the shipper had a right of appeal to the Commission, which had power to pass upon the reasonableness of the request.[1] The Act of June 18, 1910 added to the foregoing, the clause

> "and to provide reasonable facilities for operating such through routes and to make reasonable rules and regulations with respect to the exchange, interchange and return of cars used therein, and for the operation of such through routes, and providing for reasonable compensation for those entitled thereto."

Only to meet an emergency can a carrier refuse to perform the service which it holds itself out to perform; and even declaration of an embargo is to be justified on the basis of a better performance of service. The embargo is declared to prevent clogging of the line, and a threatened collapse of service.[2] The car service

[1] Lake & Rail Butter and Egg Rates, 29 I. C. C. 45; Application of S. P. Co., 32 I. C. C., 690, 695; Mo. Pac. Ry. Co. *v.* Larabee Flour Co., 211 U. S. 612; L. & N. R. R. Co. *v.* Cook Brewing Co., 223 U. S. 70; Director General *v.* Viscose Co., 254 U. S. 498.

[2] "Where physical disabilities prevent the carriers from handling certain kinds of traffic for particular destinations, or where the consignees are unable promptly to accept delivery, the embargo is properly invoked." Coal from Arkansas, 49 I. C. C. 727, 731. The rule governs that there may be no discriminatory practice in enforcing an embargo. Rogers & Co. *v.* P. & R. Ry. Co., 12 I. C. C. 308. But an embargo need not be filed with the Commission. LaFayette Box Board & Paper Co. *v.* Director General, 59 I. C. C. 105, 107; Lieberman *v.* C. & N. W. Ry. Co., 59 I. C. C. 599, 600. The courts have approved the principle of declaring embargoes where a congestion of traffic results from sudden and unexpected demands upon

amendment of 1917, supplemented and restated in 1920, added further definiteness to the service requirement. Car service was, in 1920, defined in inclusive terms to cover:

> "The use, control, supply, movement, distribution, exchange, interchange and return of locomotives, cars, and other vehicles used in the transportation of property, including special types of equipment, and the supply of trains."

The Transportation Act also fixed the duty of every common carrier by railroad to furnish safe and adequate "car service," as thus defined, and to establish reasonable rates, rules, regulations and practices in respect thereto.

§ 2. The further provision of the new law which adjured the Commission to consider the needs for adequate service when fixing a general rate level was legislative recognition of the fact that the competitive improvement of service and facilities, heretofore depended on, had slowed down. The necessity for equalization of rates had forced railroad competition, both before and after public regulation became effective, to make itself felt by improvements in service, or by the extension of privileges and facilities connected therewith. Thus on competitive traffic, even when the same published rate was charged, one carrier could frequently offer the shipper more in the way of service than could a rival carrier. This superiority of service might take the form of more expeditious movement, safer carriage, a more certain car supply, or any of the great variety of forms in which railroad transportation service is offered. Shippers, of course, played rail-

railroad facilities. In Penn. R. R. Co. *v.* Puritan Coal Co., 237 U. S. 121, 133, the Supreme Court said: "Ordinarily a shipper, on reasonable demand, would be entitled to all the cars which it could promptly load with freight to be transported over the carrier's line. But this is not an absolute right and the carrier is not liable if its failure to furnish cars was the result of sudden and great demands and which it could not reasonably have been expected to meet in full." In Eastern Railway *v.* Littlefield, 237 U. S. 140, 145, the Court said: "Where, without fault on its part, a carrier is unable to perform a service due and demanded, it must promptly notify the shipper of its inability, otherwise the reception of goods without such notice will estop the carrier from setting up what would otherwise have been a sufficient excuse for refusing to accept the goods or for a delay in shipment after they had been received." This notice is generally termed the "notice of embargo." By an amendment to the Interstate Commerce Act contained in the Transportation Act, 1920, the Interstate Commerce Commission is now given jurisdiction over embargoes in times of emergency. This is the first legislative recognition of the right to embargo freight.

roads against each other in their demands for service, and each railroad manager to hold his traffic was forced to offer the same or better service than his competitors, or, when this was impossible by reason of circuity of route, or otherwise, to compensate by a privilege equally valuable, though of a different character.[1]

Thus the competitive influences which had tended to reduce rates had also tended to improve service. Roads which were not situated to meet the service of their competitors upon an equal basis, at least up to the point where congestion of traffic slowed down a competitor, were forced either to establish rates upon a differential basis, or, if their inferiority of service did not justify such a radical step, to maintain the competitive rate and to take what traffic fell to them. Such conditions account for some, but by no means all, of the "weak roads." These, even in periods of congestion, have exhibited those conditions of unused capacity which threaten solvency, whenever the pressure of traffic is relieved on the better located and equipped lines, and there are few crumbs to fall.

The generally unfavorable credit situation, due in large part to business catching up with capacity on the "strong roads" at a time when a higher price level threatened to close the gap between operating costs and gross income, served to slow down the operation of the competitive force in seeking out possible improvements to service so as to attract business. In the period following 1907 the "wastes" of competition, wastes much easier to talk about than to demonstrate practically, were emphasized in public speeches—in Congress and out—and, in 1920, made the basis of the requirement that a scheme for consolidation be developed, together with a scheme for the common use of terminals. The Railroad Administration made much of its achievements in cut-

[1] Drayage allowances illustrate competitive practices of this character. The principle was established in Wight *v.* U. S., 167 U. S. 512, that discriminations in making allowances of this character, based upon the purely local competitive situation, were in violation of the equal treatment provision of Section 2 of the Act. The same considerations, applied to switching absorptions, were the basis of the Richmond controversy, Richmond Chamber of Commerce *v.* S. A. L. Ry. Co., 44 I. C. C. 455, upheld by the Supreme Court, Seaboard Air Line Ry. Co. *v.* U. S., 254 U. S. 57.

Drayage allowances to equalize terminal services are discussed, Louisville Board of Trade *v.* L. & N. R. R. Co., 40 I. C. C. 679, 684. The general principles are reiterated in Drayage Absorptions, 43 I. C. C. 472.

ting down wasteful haulage, possible under unified management. But any consolidation plan must by law provide for the continuance of service competition, unless the Commission under special circumstances finds monopoly justified. The aim is to secure the benefit of large scale operations, and also, so far as possible, to eliminate wasteful duplication, while preserving competition on long hauls, for the general purpose of inducing improved service through this force.[1]

The economic conditions after 1910 created the great problem which the railroad managers and the Interstate Commerce Commission must now face under the Transportation Act, if the American scheme of railroad regulation is not to fail. Railroad credit must be rehabilitated to the end that the railroads may find it possible and desirable to make those improvements to plant, as a part of the performance of their service obligation, which, in the day of easy railroad credit, were furnished from sheer force of competitive necessity up to the point where insolvency was threatened, and even realized.[2]

§ 3. The accomplishments of private initiative, enforced through competitive interest, call for generous and frank recognition. They have carried American railroad service to the present high level of adequacy and safety. The contributions of American railroad men to world railroad practice have been startling: the swivel truck, the buffer, the coupler, the air brake, the vestibule, the electric block signal, the Pullman car, the refrigerator car. The single standard gauge for 165,000 miles of line was achieved by 1890 without legislative interference such

[1] See below, Chapter XXVII.

[2] See discussion below, Chapters XXI and XXII. The following from Mr. Herbert Hoover's statement before the Interstate Commerce Commission, Feb. 2, 1922, is pertinent:

"One thing is absolute, our transportation facilities are below the needs of our country, and unless we have a quick resumption of construction, the whole community, agricultural, commercial, and industrial, will be gasping from a strangulation caused by insufficient transportation the moment that our business activities resume. For the past five years we have had no consequential expansion to our railway transportation machine. With but one interval of nine months in 1918 and 1919, we had a car shortage throughout the whole of the years 1917-18-19-20. This shortage rose to as high as 160,000 cars with a corresponding shortage of motive power. We paid tremendous sums in commercial losses and unemployment in consequence. We laid it onto the war. We should lay it onto our lack of foresight and antagonism to railroads." Monthly Commerce Reports, Feb. 13, 1922.

as concluded the English "battle of the gauges."[1] The standard time zones necessary for through operations were the result of coöperative railroad effort.[2]

[1] The needs of war time, 1861–1865, emphasized the importance, for through handling, of cars of standard gauge. The gauge of 4 feet 8½ inches, the English standard, was always general in the territory north of the Ohio, the gauge of 5 feet, general in the South. By Act of Congress in 1863 the 4 feet 8½ inch gauge was adopted for the Pacific Railroad, and this seems to have decided the issue once for all, although it was not until 1897 that the American Railway Association formally adopted that gauge as standard. By 1897 this was, however, a mere ratification of a condition existent. The Southern gauge had, in 1886, been narrowed to the Northern standard. Changing trucks underneath the car bodies, although ingeniously provided for, had proved at best a mere makeshift. Laying a third rail to accommodate equipment of different gauges was hardly better, since it was necessary to run separate trains. The competition over long distances, especially on low grade traffic, forced economies which could be achieved only by a standard gauge, and interchangeable equipment. The Erie gauge was maintained at 6 feet until 1882 and the Erie with its Western connection to Cincinnati, the Atlantic & Great Western, and the Ohio & Mississippi (the Cincinnati-St. Louis line of the Baltimore & Ohio), constituted the original "broad gauge" line between tidewater and the Mississippi. The Denver & Rio Grande, including the extension to Salt Lake, was built as narrow gauge (3 feet) and the through line was not rebuilt until 1890. That system still operates some 900 miles of narrow gauge line in the mountains of Colorado, but, except to connect branches of narrow gauge line, there is no third rail laid. All through traffic to and from the narrow gauge lines is transferred. The Union Pacific line from Ogden to Butte was first built as narrow gauge, but was standard gauged in 1886-1888. The predecessor company of the St. Louis-Southwestern, the St. Louis, Arkansas & Texas, completed in 1883, was also a narrow gauge line, broad gauged in 1887; the predecessor company of the Missouri Pacific line through Little Rock, the Cairo & Fulton, originally built to a 5 foot gauge, was standard gauged in 1879 on the 4 foot 8½ inch standard. In general the process of end-to-end consolidation, even before the days of through competition, forced the standardization of gauge. The famous "Erie War" of 1853 was occasioned by such a change. That part of the present New York Central from Erie to the state line (20 miles) had originally been built with a 6 foot gauge, although it met standard gauge at both ends. No through trains could be run between Buffalo and Cleveland. Local interests sought to prevent Erie being made a way station. The story is told in C. F. Carter's *When Railroads Were New*, p. 214.

[2] See H. S. Haines, *Efficient Railway Operation*, pp. 387-389.

The daylight saving act of 1918 placed with the Commission the responsibility of fixing the exact boundaries of the time zones. The Commission found a "confused situation." Standard Time Zone Investigation, 51 I. C. C. 273, 499, 555; 53 I. C. C. 208; 57 I. C. C. 455; 59 I. C. C. 249; 64 I. C. C. 281; 66 I. C. C. 566. The numerous supplemental cases indicate a variety of competing interests which could be handled only by placing the power to fix the time zones in the hands of a single governmental agency. The relationship of the time fixing function to service regulation is apparent from the following quotation from a typical order:

"In granting permission to the Akron, Canton & Youngstown to carry standard central time on the Northern Ohio from Plymouth to New London for operating purposes, we do so upon petitioner's expressed

Standard gauge alone was not sufficient for universal interchange of cars; the rolling stock itself in certain essentials had to be standardized; there had to be a uniform coupler, a uniform height of drawbar, and a uniform system of braking. Standardization of these has been largely, though not exclusively, achieved by the coöperative efforts of the railroads. Not inconsiderable contributions have been made by business organizations seeking to market particular inventions. The railroad associations, or associations of railroad officials, merely did the testing. The private interests supplied the materials for experiment, going to an expense commensurate with the prize to be gained. The Master Car Builders' Association did the testing of the self couplers; the Master Mechanics' Association, the testing of the air brakes. Out of a series of tests of couplers, the Master Car-Builders' type coupler was evolved, a device further improved in the interest of safety by an attachment permitting operation by hand from the side of the car. It was this type of coupler which was required by the Safety Appliance Act. In 1886 a comprehensive test of the various braking devices was made, by equipping whole trains (25 and 50 cars) with the competing braking devices, including both vacuum and compressed air brakes. In 1887, a Committee of the Master Mechanics' Association conducted further trials with an improved Westinghouse installation on the same ground, the line of the Chicago, Burlington & Quincy near Burlington, Iowa. By the end of that year fifty-car freight trains were being effectively controlled with the improved installation. The requirements of the Safety Appliance Act of 1893 were only possible when these experiments and tests had demonstrated clearly the practicability of the equipment called for. This Act also recognized the American Railway Association as the body best qualified to designate the standard height of the drawbar.[1]

undertaking to show in its published advertisements, its time cards intended for public use, bulletin boards in stations, and in other like ways, the arrival and departure of trains between those stations with reference to standard Eastern time."

The Detroit situation is discussed at length, 73 I. C. C. 78.

[1] The American Railway Association has had an interesting evolution. It began as a General Time Convention, organized in April, 1875, and was consolidated in April, 1886, with a Southern Time Convention, organized in October, 1877. The consolidation of the Southern and General Time Conventions in 1886 coincided with the change of gauge on Southern

These are the almost revolutionary improvements which Americans contributed, their general introduction being effected through competitive pressure, once their practicability had been achieved and demonstrated. Minor improvements are too numerous to mention in detail. Railroad managers, if they were to hold their traffic, had no choice except to furnish faster, more comfortable, safer passenger service; faster, more convenient, surer freight service. The widespread technical improvements have, therefore, been largely the result of the competitive effort brought to bear upon one of these aspects of service, and the changes made to meet one condition have frequently carried consequences involving improvement in other directions. The steel passenger car, essentially important for safety, has created a necessity for heavier rails and better roadbed—and this in turn has made possible greater speed and easier riding. In the freight service, where accidents cause property damage rather than loss of life, the pressure for sure service is hardly less than the pressure for safe passenger service. Goods are sold, bought, and shipped with the aim of securing delivery at a certain time and place. Frequently a resale profit is dependent upon the ability to get a prompt delivery. It is small satisfaction that a loss or damage claim may be filed. This is at best but a potential lawsuit, and frequently is expensive of patience, if not of time and effort. What the shipper wants is a completed performance, not the inconvenience of a duplicated order, even when such duplication is possible.

§ 4. But the effect of competition in service has not been confined solely to improvements in the railroad plant, nor to the introduction of safety appliances. There has been a competitive extension of "privileges," and a performance of additional services. These have been most significant in the freight service. The extra fast, extra fine passenger trains have also been extra fare trains, but scheduled freight trains promising delivery at a particular hour have been generally operated without extra charge, frequently by end-to-end connections seeking to meet the

roads from 5 feet to 4 feet 8½ inches. The change of title to American Railway Association was made five years later. It was not a far step from fixing standard time to take up the consideration of standards governing physical operations: standards for the road bed and equipment, and standard rules to govern the running of trains.

competition of direct system routes. Special package cars have been run to achieve faster service on less-than-carload merchandise and to minimize damage from rehandling at transfer points. The peddler car service extended to the packers, by which the great volume of traffic in refrigerated fresh meat is handled throughout the country, is another similar development.[1] Within terminals, carriers less favorably situated than their competitors have absorbed switching charges in order that they might make deliveries upon equal terms, or they have undertaken to furnish store-door or car-spotting service without addition to the general transportation rate.

In inaugurating service of this character railroads serving one center have watched out for the service interests of their patrons in competition with rivals located in another center. In this vigilance they have been ably seconded by local Chambers of Commerce. Especially keen has been the service competition on goods distributed from Chicago and St. Louis. The extensions of the privilege of transit and reconsignment are illustrative of the same principle. The working of competition in the extension of such privileges is well illustrated by the development of the "fabrication in transit" privilege. Originally established by the Wheeling & Lake Erie to place its service on an equality with service offered by other lines more strategically located, the practice spread from one line to another until it became general.[2] Such extension has been typical of service competition.

Service competition has by no means been limited to the relations between roads serving different cities. It is seen in an individual city in the extension of freight terminals to new business centers, in the building of fine passenger terminals, or in the extension of lines to more convenient points. An outstanding illustration is the building of the Pennsylvania terminal in New York City to avoid the ferrying between Manhattan Island and the New Jersey shore. But the extension of the lighterage service in New York had long since equalized transportation charges over the whole harbor.[3] In Chicago, the practice of

[1] National Wholesale Grocers' Asso. *v.* Director General, 62 I. C. C. 375, 379, 402.

[2] Fabrication in Transit Charges, 29 I. C. C. 70.

[3] New York Harbor Case, 47 I. C. C. 643, 670. The payment of allowances for lighterage furnished by shippers, alleged to result in discrimination,

absorbing switching charges resulted in the same condition.[1] Another illustration was the unique store-door delivery service in Baltimore, since abandoned.[2] Elsewhere the car-spotting and trap-car services developed, which gave rise to acrid discussion during the Five Per Cent Case. The evidence and opinion in that case illustrate the fundamental relationship of service and rates. Saving money through curtailments of the transportation service furnished *others* (this is important!), was there suggested by many who opposed the carriers' request for an increase in charges. It was one way of meeting the carriers' showing of increased operation costs. The suggestion influenced the majority of the Commission. The opinion pointed out that great savings might be made in a number of directions by tightening up service regulations.[3] But later, when the carriers attempted to impose charges for trap-car service and spotting cars, the Commission first suspended their tariffs and then, upon hearing, ordered them cancelled. The shipping interests concerned in the suspension case successfully contended that the charge for these services had been included in the general rate, and that to eliminate or curtail the service would be a great injury to the particular portions of the shipping public which they represented.[4] This argument the Commission upheld.

A parallel contrast in interests appeared in the Western Passenger Rate Case. There the representatives of the states alleged wasteful competitive practices of the carriers, basing their argument upon the increased speed of trains, improved dining cars, lounge cars, and club cars, and duplication of service between

was the cause of complaint to the Commission: Federal Sugar Refining Co. *v.* B & O. R. R. Co., 17 I. C. C. 40; 20 I. C. C. 200; decision by the Supreme Court: U. S. *v.* B. & O. R. R. Co., 231 U. S. 274.

[1] The history of the Chicago Switching District, and the occasion and competitive interests leading to its creation are explained: Advances on Coal within Chicago Switching District, 27 I. C. C. 71; Gravel & Sand Switching at Chicago, 32 I. C. C. 291; Rates on Hay to Chicago, 34 I. C. C. 150.

[2] Washington, D. C., Store Door Delivery, 27 I. C. C. 347.

[3] Thus it was suggested that great savings might be made by cutting the allowance of free time for loading and unloading carload freight, by cutting costs of collecting and delivering freight, by charging for storage, by eliminating the free transportation of containers, by ceasing to furnish free transportation of dunnage and preservatives, by requiring payment for wharfage and dockage, refrigeration, loading and unloading carload freight, and reconsigning. 31 I. C. C. 350, 407.

[4] Car Spotting Charges, 34 I. C. C. 609.

important terminals over the lines of rival carriers.[1] But there was no representative of any of the state commissions "who was willing to admit that the local service afforded in the state he represented might be curtailed in any manner and thereby economies brought about." [2] In other words, there is almost sure to be a conflict of interests, either sectional or industrial (or both), whenever any proposal comes for a curtailment of railroad service or for inaugurating a charge for a service formerly covered by the general haulage charge. Denials of rate increases upon the basis of economies to be effected through the curtailment of service may occasionally constitute a means by which rate increases may at the time be successfully resisted. But there is nothing helpful or constructive in such tactics.

§ 5. The strength of competition in service was also its greatest weakness. It focused the attention of the management upon competitive business and sometimes left aside the purely local business which had recourse to no alternative route. The conflict of motives was much the same as that which existed between the desire to build up business, which could be controlled, and on this account to charge low rates at junction or competitive points, and the desire, in the interests of revenue as a whole, to maintain higher rates at intermediate points. The result of discrimination was certain to be a clear extension of regulation to the service field. And yet, when the vital interrelations of rates and service have been disclosed, this extension seems to have been postponed a surprisingly long time. The reasons for the delay lie in the highly technical and difficult nature of railroad operation, where governing conditions vary between railroads, and even between different divisions on the same railroad. Practical experience seems to be demanded. It has been one thing for a legislature, hitting out more or less blindly, to turn rate making over to "men whose minds were a blank" [3] on railroad matters; it would have been quite another thing to have built up a personnel to regulate service. The Commission could hardly have withstood opposition had it been prepared to invade what was

[1] Elimination of service duplication of this character was cited by Mr. McAdoo (Report to the President, Sept. 3, 1918) as one of the achievements of the Railroad Administration.

[2] Western Passenger Fares, 37 I. C. C. 1, 41.

[3] Charles Francis Adams, *Railroads: their Origin and Problems*, p. 133.

then looked upon as purely the field of private enterprise. Competition was depended upon to achieve adequacy of service. Safety regulations were made, but the quantum of railroad service was left to the railroad managers until financial difficulties began to restrain the influences of railroad competition. The public then asserted the right to regulate adequacy of service, while it placed with the Interstate Commerce Commission the duty of rehabilitating railroad credit.

Still another reason for the hesitancy of the public to undertake dictation in respect to railroad service rested in the possibility of legal obstacles—not a few of them long since thrust aside, but, in the early days before the development of a body of railroad law, apparently formidable. Did not the Constitution of the nation and of the states alike surround railroad investments with all the safeguards by which the American form of government had sought to protect private property? The fear of overstepping the bounds of the constitutional protection of property rights has doubtless been one of the underlying reasons for the tardy public attempt to dictate the kind, quality and form of transportation to be furnished by the railroads. Certainly the right of the public to require the investment of private capital against its will in railroad enterprises, or in any other particular form of commercial activity, has never been recognized. Only by bringing pressure upon the person engaged in a public service, that is, upon the railroad corporation as a subject of the law, has the investment by railroads in particular facilities been compelled, and then only as a part of the voluntary undertaking of the carrier to furnish the service in the first instance. It will require an opinion of the Supreme Court to determine whether the power to require the building of branch lines of railroad, placed with the Interstate Commerce Commission in the Transportation Act, 1920, is, or is not, constitutional.[1] And such appeal will doubtless await the contest of an affirmative order issued by the Commission. After all, there is little fundamental difference between requiring stockholders to utilize a company's funds in a particular way, and in requiring them to use their own funds. The existence of the corporation hides the real issue.

[1] Kenneth F. Burgess, "Compulsory Construction of New Lines of Railroad," *Michigan Law Review*, Vol. 20, p. 699, and below, Chapter XX.

The attitude of the individual citizen is very likely to depend upon whether or not he owns railroad shares.

§ 6. The scope of the regulation of railroad service, once asserted, has steadily widened, exactly as did the scope of the regulation of rates. Service regulation began with state and even municipal action, based not upon the obligation of the carrier to furnish adequate service, but rather upon the police power of the local government: the right to safeguard the life and health of the public; the right to legislate when the safety of members of the community is at stake. Unless there was an aroused public feeling, competition was not likely to encourage any great financial sacrifice for the protection of either employees or the general public, in the absence of a rather conclusive showing to the railroad managers that thereby they would effect an early saving of money. Municipal ordinances requiring the installation of gates at grade crossings were followed in a later day by requirement for the elevation of tracks or the depression of streets. The speed of trains was limited, electric headlights were required on locomotives, and in some instances, the number of trainmen was fixed by state laws. State regulation of service also extended to the furnishing of station facilities, to the stopping of trains at particular towns, and to the furnishing to the public of drinking cups and other conveniences upon the trains. Political considerations have not always been absent in some of these local regulations. Spite against the railroads has sometimes been a factor, and there are railroad men who doubtless would say that political motives were always present. In the case of the full crew laws, active support of labor organizations was apparent—a cold-blooded attempt to "make work," the railroad managers insisted in opposition.

Federal regulation of service began with requirements which, while concerned with safety, were also indirectly concerned with the quality of service. The automatic coupler meant the saving of lives of employees, but its standard installation made cars generally interchangeable; the air brake was also an element in eliminating risk for the trainmen, but it eliminated risk also for the passengers, and again standard installation was an element in making cars interchangeable. Better service (quite aside from the safety factor) was a by-product of legislation enforcing an

installation of many safety devices. It was the desire for safety of operation which was advanced to justify the Hours of Service Law. This prohibits any railroad engaged in interstate commerce from requiring or permitting an employee to remain on duty for a longer period than sixteen consecutive hours.[1]

§ 7. But safety of service and adequacy of service are two quite different things. *Safety of service* has called for regulations generally applicable to all carriers by uniform rules and not in essence interfering with routine of operation. But for the public to undertake to regulate in detail the *adequacy* of the transportation equipment and to direct the routine operations of railroads would come dangerously close to the insistence by the public of the right to substitute a bureaucratic control for the judgment of the management of the company. The time for such control may come; clearly it has not now been assumed by the regulating power. The final limitation upon the power of the public is by no means certain. How the courts would hold should there be further legislative encroachments upon the exercise of initiative and control by railroad managers cannot be said. The language of the Supreme Court has indicated that the power to regulate service is not without limit:

> "But broad as is the power of regulation, the state does not enjoy the freedom of an owner. The fact that the property is devoted to a public use on certain terms does not justify the requirement that it shall be devoted to other public uses, or to the same use on other terms, or the imposition of restrictions that are not reasonably concerned with the proper conduct of the business according to the undertaking which the carrier has expressly or impliedly assumed. If it has held itself out as a carrier of passengers only, it cannot be compelled to carry freight. As a carrier for hire, it cannot be compelled to carry persons or goods gratuitously. The case would not be altered by the assertion that the public interest demanded such carriage. The public interest cannot be invoked as a justification for demands which pass the limits of reasonable protection and seek to impose upon the carrier and its property burdens that are not incident to its engagement."[2]

The doctrine stated in this general language is not inconsistent with the aims and requirements of the Transportation Act.

[1] Sustained by the Supreme Court, Baltimore & Ohio R. R. Co. *v.* I. C. C., 221 U. S. 612; U. S. *v.* Brooklyn Eastern District Terminal, 249 U. S. 296.

[2] Northern Pacific Ry. Co. *v.* N. D., 236 U. S. 585, 595.

§ 8. The right of the public to regulate the safety and adequacy of railroad operations as conforming with basic principles of service regulation has thus been clearly established. The principle that private capital engaged in common carrier service is obligated to furnish continuous and uninterrupted service, in so far as this is physically possible, is likewise important. If the charter or franchise which a railroad corporation has accepted, and under which it exists, provides that it shall operate a particular line of railroad, the corporation can be compelled to continue the operation so long as it continues any rights under the charter.[1] In the absence of such a charter provision, however, the police power of the state cannot prevent private corporations from discontinuing operation where financial loss would inevitably follow,[2] and even when such provision is present, the law cannot enforce operation if the owners refuse longer to make up deficits. Under the Transportation Act, 1920, no railroad can abandon even a portion of its line, in so far as interstate commerce is concerned, without permission from the Interstate Commerce Commission, although probably within the rule laid down in previous decisions of the Supreme Court it may cease its entire operation in order to avoid financial disaster. The requests for permission to abandon lines of railroad have frequently followed, rather than preceded, cessation of operation.[3]

The continuity of service principle was used by the Supreme Court upholding the right of Congress to legislate respecting the wages of railroad employees. The Adamson Bill providing for the basic eight hour day for employees in train service was passed when the country was confronted with an imminent interruption of interstate commerce by a threatened general strike of the train service employees.[4] The Court, in a divided opinion, upheld the constitutionality of this Act, drawing a distinction between the ordinary right of contract and the fixation of wage scales of railroad employees. The Court said:

[1] Mo. Pac. Ry. Co. *v.* Kans., 216 U. S. 262, 276.

[2] "If the plaintiff (a railroad company) be taken to have granted to the public an interest in the use of the railroad, it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss." Brooks-Scanlon Co. *v.* R. R. Com. of La., 251 U. S. 396. See also Bullock *v.* Fla. R. R. Com., 254 U. S. 513.

[3] See discussion in detail, below, Chapter XX.

[4] Wilson *v.* New, 243 U. S. 332.

> "If acts which, if done, would interrupt, if not destroy, interstate commerce, may be by anticipation legislatively prevented by the same token, the power to regulate may be exercised to guard against the cessation of interstate commerce, threatened by a failure of employers and employees to agree as to the standard of wages, such standard being an essential prerequisite to the uninterrupted flow of interstate commerce."

Prior to this decision it had been asserted by many lawyers that Congress could not legislate within this field without abridging the freedom of contract guaranteed under the Federal Constitution. Doubtless the decision of the Court was influenced by the public emergency which confronted the country. But, on the whole, there is no sound reason for objecting to the establishment of the superior right of the public to legislate in any reasonable manner to insure the continuity of operation of interstate carriers. The provisions of the Transportation Act, 1920, relating to the operation of the Railroad Labor Board, aimed to promote continuity of operation by establishing machinery for the orderly disposition of wage disputes.[1]

[1] Chapter XXV.

CHAPTER XIV

REGULATIONS OF SAFETY AND HEALTH

§ 1. The states, from the beginning of their jurisdiction, have asserted the right to regulate the activities of all citizens in the interest of the health, safety and morals of the people as a whole. Regulations of this character were held not to constitute a taking of property without due process of law if they were not arbitrary and were reasonably appropriate means of attaining a lawful end. In other words, even under our legal concept of the rights of private property, it has been recognized that the government possesses the superior right of interfering with the freedom of action of the owner in the use of his property, in so far as such interference is desirable in the interest of the public good. Thus in the famous Slaughter House Cases,[1] the right of the state to concentrate the slaughtering of live animals at a particular location in the city of New Orleans was upheld; and in the Oleomargarine Cases [2] the Supreme Court of the United States sanctioned state laws prescribing rules for the manufacture, marking and sale of butter substitutes.

Regulations of this character do not depend upon the same principles as do regulations of railroad rates. As to the latter, the right of the public to regulate the charge depends upon the voluntary undertaking by the railroad corporation of common carrier service. The clear right to regulate the reasonableness of the charge is subject only to the limitation that the public may

[1] 83 U. S. (16 Wallace) 36.

[2] Powell *v.* Penn., 127 U. S. 678; Plumley *v.* Mass., 155 U. S. 461; Schollenberger *v.* Penn., 171 U. S. 1.

not act to confiscate the property. But wholly regardless of the public nature of this character of activity, the public right to restrain the use of property so that it shall not be used to the injury of the general public, is unquestioned. Many aspects of the railroad service are subject to these so-called "police regulations," enacted under the so-called "police power" of the state. From the very beginning of railroad operation in this country—long before the full scope of the public's right to regulate railroad rates was developed—the states enacted, and the courts upheld, service regulations in the interest of health, safety and morals of the community.[1] They were sometimes made directly by the state legislatures, in other cases by the municipal governments, which had been authorized by the state to enact them within the province of specified jurisdictions. Thus the municipalities made many regulations for the giving of signals by means of a bell or whistle on approaching public crossings. They fixed the rate of speed through the confines of the corporate limits of a municipality, and required the lighting of tracks and the maintenance of signboards and gates at crossings. Sometimes the presence of flagmen has been required. The legislatures of the states also enacted regulations dealing with certain phases of train service,—in the South, for example, providing that separate coaches should be furnished for colored passengers.[2] In many states provision

[1] In Erie R. R. Co. *v.* Public Utility Commrs., 254 U. S. 394, 410, the Supreme Court of the United States described the police power of the state as follows: "Grade crossings call for a necessary adjustment of two conflicting interests—that of the public using the streets and that of the railroads and the public using them. . . . Being places to which the public is invited and that it necessarily frequents, the State, in the care of which this interest is and from which, ultimately the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power. . . . It is said that if the same requirement were made for the other grade crossings of the road it would soon be bankrupt. That the States might be so foolish as to kill a goose that lays golden eggs for them, has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil."

[2] Some of the earliest service regulation cases which the Commission considered had to do with these "Jim Crow" car laws. The principle was announced in 1887 and 1888, Council *v.* W. & A. R. R. Co., 1 I. C. C. 339, and Heard *v.* Georgia R. R. Co., 1 I. C. C. 428, and reiterated in 1907, Edwards *v.* N. C. & St. L. Ry. Co., 12 I. C. C. 247, that carriers

was made for safety couplers, for the heating of cars within specified temperatures, for the furnishing of drinking water and for the equipment of locomotives with electric headlights. These regulations were generally upheld except where the statutes or ordinances were so inartistically drawn and so ambiguous as to be void. In testing their validity the courts resorted to the same principles applied in a later day in passing upon legislative requirements for the protection of employees from dangerous machinery in all sorts of private manufacturing businesses. The determining consideration was not the existence of the common carrier obligations which the railroad corporation had assumed, but rather the fact that the public had a right to protect its citizens against any one using his property so as to injure others.

§ 2. Later on in the development of railroad regulation, the Federal government entered this field of service regulation, prompted to do so largely by the confusion arising from the conflicting nature of the regulations which adjoining states had imposed. That each legislature was left largely to its own judgment to determine what means was reasonably appropriate to the desired end meant that the requirements of the resulting legislation differed in many respects. The fact that different legislatures usually had different technical advisers, and were subject to different local pressure, added to the confusion. Prior to the enactment of the Federal headlight law, it was asserted that on a single railroad passing through several states, a locomotive might be required to change its headlight at each state line before it could proceed. One state required that drinking cups be furnished to passengers; another, on sanitary grounds, prohibited the furnishing of public drinking cups. This lack of uniformity of state regulations, and the ever-growing conception of the railroad corporation as a national enterprise, led to action by the Federal government. But the national government possesses no "police power" as this power has been defined by the

might not, in the accommodations furnished, discriminate between white and colored passengers paying the same fare. This holding was followed in Cozart *v.* Southern Ry. Co., 16 I. C. C. 226, 230; Gaines *v.* S. A. L. Ry. Co., 16 I. C. C. 471.

The right to segregate white and colored passengers has been upheld by the Supreme Court: Hall *v.* DeCuir, 95 U. S. 485; L. N. O. & T. Ry. *v.* Mississippi, 133 U. S. 587; Plessy *v.* Ferguson, 163 U. S. 537; C. & O. Ry. *v.* Kentucky, 179 U. S. 388.

courts in respect to state actions. The police power is not one of the powers granted to the National government by the states. For the Federal government to enter this field, it was necessary to look to the plenary power under the commerce clause of the Constitution. The general rule governs that, in the regulation of interstate commerce, Congress has the right to adopt any means reasonably appropriate to the end of maintaining and fostering interstate commerce. After Congress had elected to make regulations in respect to safety appliances, hours of service, and even the liability of an interstate carrier for injury to its employees, the courts were inclined to uphold the regulations as appropriate means to the end of making the Congressional regulation of commerce between the states thoroughly effective.

So, although the action by the states and the action by the Federal government, in respect to service regulations concerning the safety of railroad operation and the health of the public and the railroad employees, depend upon different principles of constitutional law, the general effect of action by the state or by the Federal government is the same. But, because of this difference in principle, the litigation which has developed has primarily had to do rather with the conflict between the state and the Federal authorities than with the ultimate legality of the safety regulations. Out of this conflict there came the series of court decisions which extended the national jurisdiction. It was inevitable that the courts should hold—as they did in dealing with regulations providing specifications for platforms on cars placed at the ends of trains [1]—that whenever the national government legislated within this field, its regulation superseded prior state action, in so far as the latter had affected interstate transportation. The courts also held that, even in the absence of Federal legislation, the states, under the guise of enacting police regulations, could not impose undue burdens upon interstate commerce. The judiciary asserted the right to determine, upon review, whether or not such burdens as might be imposed, were in fact undue.[2]

The field of safety regulation is, then, a broad one; and, because the legislatures of different states have differed not only

[1] Penn. R. R. Co. *v.* Pub. Ser. Com., 250 U. S. 566.

[2] Illinois Central R. R. Co. *v.* Ill., 163 U. S. 142; Miss. R. R. Com. *v.* I. C. R. R. Co., 203 U. S. 335.

as to the proper subject matter to be dealt with, but more particularly have differed as to the appropriate means of making the regulation, it has been inevitable, from the beginning, that ultimately the Federal government would occupy the entire field to the exclusion of state action. It would be destructive of efficient interstate operation for a single carrier to conform to all the different specifications set up by legislative discretion in each of the states through which it operates its trains. So there has grown up a great body of Federal statutory law prescribing standard requirements for safe railroad operation. The most important of these national laws are the Federal Safety Appliance Acts, the Hours of Service Act, the Twenty-eight Hour Live Stock Law, the Boiler Inspection Act, the Ash Pan Act, the Accidents Reports Act, and the Federal Employers' Liability Act.

§ 3. The first Federal Safety Appliance Act, which furnished the important precedents on which the other acts were largely built was a direct outgrowth of conflicting state action. Uniformity of equipment standards is almost prerequisite for the free interchange of cars. The first legislative action by a state requiring automatic couplers on railroad cars was by Connecticut in 1882. This was followed within ten years by statutes in Massachusetts, New York, Michigan and New Hampshire. The state legislation was enacted at a time when there were comparatively few cars in the country equipped with air brakes and automatic couplers. The annual report of the Interstate Commerce Commission shows that, in 1892, out of 1,215,092 railroad cars in the United States, only 241,411 were equipped with automatic couplers. The appalling loss of life from the use of link-and-pin couplers on railroad cars, brought to the attention of Congress by the annual reports of the Interstate Commerce Commission, and by resolutions of the national convention of state railroad commissioners, led President Harrison, in his final message to Congress on December 5, 1892, to recommend the enactment of Federal legislation dealing with this subject. Under the common law doctrine the courts had generally held that the employees assumed the risks and hazards of the use of cars with different kinds of couplers.[1] On March 2, 1893, Congress enacted

[1] Thus a brakeman was held to be without a right of action on the ground that he had assumed the risk of injury in coupling two cars having

the first Safety Appliance Act, to become effective January 1, 1898.[1] Its purpose was declared in its title to be "the promotion of the safety of employees and travelers upon railroads and to compel common carriers engaged in interstate commerce to equip their cars with automatic couplers and to install air brakes on cars and the locomotives with driving wheel brakes." Penalties were provided for failure to comply with the requirements and specifications of the Act.

In 1903 Congress amended the Act to take care of various defects which developed in its application.[2] The Interstate Commerce Commission was given general jurisdiction to supervise the enforcement of the act, and, by later amendment in 1910,[3] the Commission was authorized to standardize appliances. Under these amplified powers it has made various orders concerning the height of draw bars on freight cars, the number, location, dimensions and manner of application of all sill steps and brakes, ladders, running boards, grab irons, hand holds, etc., on all cars and vehicles subject to the Act. In other words, Congress through the medium of the Safety Appliance Act declared its right to regulate either directly, or through the medium of the Interstate Commerce Commission, all forms of safety appliances to be installed upon locomotives and cars which were used in interstate commerce. In construing the original act as amended in 1903 the Supreme Court held that the Commission had properly extended the provisions of the law to include cars which were used only in intrastate traffic, so long as they were a part of a standard equipment of a railroad which was engaged in interstate commerce.[4] It was recognized that railroad equipment is not segregated for use as to the state or interstate commerce, but that it is commingled and used interchangeably. For the

couplers of unequal height, Hulett *v.* St. L. K. C. & N. Ry. Co., 67 Missouri 239; and an experienced brakeman was held to have assumed the risk from the use of a different kind of automatic coupler on a car from that on the engine, Johnson *v.* S. P. Co., 117 Fed. 462.

[1] 27 Stat. L. 531.

[2] 32 Stat. L. 943.

[3] 36 Stat. L. 298.

[4] Southern Ry. Co. *v.* U. S., 222 U. S. 20.

In Safety Appliances, 58 I. C. C. 655, the Commission denied the application of the American Railway Association on behalf of certain railroad companies for a further extension of time within which to make their freight cars conform to certain of the prescribed standards, under the Safety Appliance Act.

Federal government to make its regulations effective, it was entirely proper that its regulations should apply to all cars owned and used by interstate carriers. After the passage of the Safety Appliance Act the Supreme Court on numerous occasions held that all state laws requiring safety appliances on any cars used on any interstate railroad had become inoperative.[1] Once Congress entered the field, its regulations became paramount.

§ 4. The successful operation of the Federal Safety Appliance Act and the upholding of the national jurisdiction by the courts led Congress in 1907 to enact a further measure in the interest of the safety of employees and travelers in interstate commerce. This was the so-called "Hours of Service" law of March 4, 1907, wherein it was provided that employees having to do with train operation should not remain on duty for a period longer than sixteen consecutive hours, and that, after having been on duty for such a period of time, an employee should be relieved and not be permitted again to go on duty until he had been off duty for at least ten consecutive hours.[2] It was also provided that whenever an employee in train service had been on duty for sixteen hours out of any twenty-four hour period, he should not be permitted to return to duty before eight consecutive hours had elapsed. The purpose of the act was obviously to protect against injury and loss through the failure of the human element which had become exhausted as a result of duty continued beyond the limits of physical endurance.

The Supreme Court sustained the validity of this Act,[3] holding that, in promoting the safety of employees and travelers in interstate commerce, Congress is not limited to the enactment of laws relating merely to mechanical appliances as exemplified in the Safety Appliance Act and its amendments. Failures in the human element due to exhaustion had more than once caused wrecks. The Act was held to apply equally to employees engaged in the operation of either state or interstate trains. The wreck of a train moving wholly in intrastate commerce on a railroad which was also engaged in interstate commerce might, quite conceivably, affect the integrity of the interstate commerce itself. On this

[1] Southern Ry. Co. *v.* R. R. Com. of Ind., 236 U. S. 439.
[2] 34 Stat. L. 1415.
[3] B. & O. R. R. Co. *v.* I. C. C., 221 U. S. 612.

feature of the case, Mr. Justice Hughes, who wrote the opinion of the Court, said:

> "By virtue of its power to regulate interstate and foreign commerce, Congress may enact laws for the safeguarding of the persons and property that are transported in that commerce and of those who are employed in transporting them. . . . The length of hours of service has direct relation to the efficiency of the human agencies upon which protection to life and property necessarily depends. This has been repeatedly emphasized in official reports of the Interstate Commerce Commission, and is a matter so plain as to require no elaboration. In its power suitably to provide for the safety of employees and travelers, Congress was not limited to the enactment of laws relating to mechanical appliances, but it was also competent to consider, and to endeavor to reduce, the dangers incident to the strain of excessive hours of duty on the part of engineers, conductors, train dispatchers, telegraphers, and other persons embraced within the class defined by the act. And in imposing restrictions having reasonable relation to this end there is no interference with liberty of contract as guaranteed by the constitution. If then it be assumed, as it must be, that in the furtherance of its purpose Congress can limit the hours of labor of employees engaged in interstate transportation, it follows that this power cannot be defeated either by prolonging the period of service through other requirements of the carriers or by the commingling of duties, relating to interstate and intrastate operations."[1]

The Hours of Service Act also placed with the Interstate Commerce Commission the responsibility to execute and enforce its provisions. To that end carriers were required to make reports to the Commission which would enable it to determine whether violations of the act had existed. Some of the disputes which have arisen under the act have reached the courts. These, however, have had to do largely with matters of interpretation as to what class of employees came under the provisions of the act, and what forms of service constituted being "on duty." The Act provides certain exemptions from liability due to "casualties" and the courts have held that derailments and collisions, whether due purely to accident or to negligence of the carrier, are such casualties as exempt the carrier from compliance with the act and permit it to retain its employees on duty for longer than sixteen hours.[2] But ordinary delays incident to train operation

[1] B. & O. R. R. Co. *v.* I. C. C., 221 U. S. 612, 618.
[2] D. & R. G. R. R. Co. *v.* U. S., 233 Fed. 62.

are not valid excuses, and the Commission and the courts have generally held the carriers to a strict compliance with the act's provisions.

§ 5. Another Federal law dealing with an entirely different form of train operation has also been sustained by the courts: the so-called Twenty-eight Hour Live Stock Law, enacted in 1906.[1] This provided that no railroad company transporting live stock in interstate commerce might confine it in cars, boats or vessels, for a period longer than twenty-eight consecutive hours without unloading in a humane manner into proper pens for rest and feed for a period of at least five consecutive hours. An exception was provided when the owners of the live stock had made written request to the carrier that the period of confinement be extended to thirty-six hours. Heavy penalties were provided for non-compliance with the law, and the courts have upheld the enforcement of these penalties on the ground that Congress had the right to regulate interstate commerce and to enact humanitarian measures of this character.[2]

§ 6. In the Federal Boiler Inspection Act of 1911, Congress has declared it unlawful for any common carrier to use a locomotive engine propelled by steam in moving interstate traffic unless the locomotive and its appurtenances are in proper condition and safe to operate.[3] The Act authorizes the President to appoint a chief inspector of locomotive boilers with two assistant chief inspectors, to coöperate with the Interstate Commerce Commission in enforcing the provisions of the act. In practical administration of the Boiler Inspection Act, the United States has been divided into fifty boiler inspection districts with one inspector for each, appointed by the Interstate Commerce Commission. These inspectors have the duty of ascertaining whether carriers are complying with the rules and regulations established by the Interstate Commerce Commission for the design and maintenance of locomotive boilers. Penalties for failure to comply are provided, the carriers are required to file reports prescribed by the Commission, and the Commission is given broad power in respect to reports of accidents resulting from defective

[1] 34 Stat. L. 607.

[2] U. S. *v.* St. Joseph Stock Yd. Co., 181 Fed. 625; U. S. *v.* C. St. P. M. & O. Ry. Co., 245 Fed. 179.

[3] 36 Stat. L. 913.

appliances. An amendment of March 4, 1915, extended the provisions of the act to apply to and include the entire locomotive tender and all parts and appurtenances thereof.[1] Under this act, therefore, the Federal government has asserted jurisdiction over the entire equipment of locomotives used in interstate commerce.

Under the original Boiler Inspection Act, the Supreme Court of the United States upheld a statute of the state of Alabama prescribing specifications for electric headlights on locomotives,[2] but, under the amended act of 1915, it was held that the Federal government has asserted jurisdiction over the entire field of locomotive equipment to the complete exclusion of state statutes. The duty of the carrier is now to comply with the Federal statutes and not with the state laws.[3]

The Ash Pan Act of 1908 is in reality a corollary of the Boiler Inspection Act.[4] It provides that no common carrier shall use a locomotive moving in interstate commerce which is not equipped with an ash pan that can be dumped, cleaned and emptied, without the necessity of an employee going under the locomotive. The enforcement of this act also rests with the Interstate Commerce Commission, since it is the duty of the Commission to lodge information of any violation which may come to its knowledge with the proper United States District Attorney. The act specifies that its provisions shall not apply to any locomotive on which, by reason of the use of oil, electricity, or other similar agency an ash pan is not necessary.

§ 7. The Federal Accidents Report Act of May 6, 1910, likewise operates in the interest of the safety of employees and travelers.[5] It supplements and focuses the results of the other safety acts. It imposes the duty on the general manager or other proper officer of every common carrier engaged in interstate commerce, to make to the Interstate Commerce Commission under oath, a monthly report of all collisions, derailments, or other accidents resulting in the injury of persons, equipment or roadbed, arising from the operation of the railroad. The reports are made under rules and regulations prescribed by the Interstate

[1] 38 Stat. L. 1192.

[2] A. C. L. R. R. Co. *v.* Ga., 234 U. S. 280.

[3] L. & N. R. R. Co. *v.* State (Ala., 1917), 76 Southern 505; 16 Ala. App. 199.

[4] 35 Stat. L. 476.

[5] 36 Stat. L. 350.

Commerce Commission, and state the cause of the accident and the circumstances connected therewith. The Interstate Commerce Commission has frequently issued published reports on accidents, presenting to the public its conclusions as to the cause of the accident and the responsibility therefor. Publicity of this character tends to tune up managerial responsibility.

§ 8. One of the most far reaching of the Federal regulations dealing with the safety of railroad operation has been the Federal Employers' Liability Act. The various safety appliance statutes of the Federal government were enforced by penalty provisions, involving fines against the railroad and fines and terms of imprisonment of railroad officers. But it was conceived that the national government, after legislating on this general subject matter, owed a further duty to the railroad employees.

In 1906, the first Federal Employers' Liability Act was passed, seeking to give a Federal right of action to employees, or in case of their death, to certain classes of beneficiaries, for injuries resulting from railroad negligence.[1] The first act was declared invalid by the Supreme Court because its terms were held to include all employees of interstate carriers regardless of whether or not they were engaged in interstate commerce at the time of their injury.[2] Following this decision, which was rendered in 1908, Congress, then in session, passed a second act, with the provisions condemned by the Supreme Court eliminated.[3] This act was subsequently upheld as valid.[4] Its general purpose was the same as that of the original act. It provided: (1) that contributory negligence of the employees did not bar recovery (contrary to the rule in many states), but should be considered by the jury only as diminishing the damages; (2) that the principle of assumption of risk by the employee should not be a defense where the violation of a safety law contributed to the accident, and (3) that all contracts intended to exempt the railroad from liability under the act should be void.

There has been much litigation under this act and large volumes have been written dealing with its construction.[5] One

[1] 34 Stat. L. 232.
[2] The Employers' Liability Cases, 207 U. S. 463.
[3] 35 Stat. L. 65.
[4] Second Employers' Liability Cases, 223 U. S. 1.
[5] See especially, Roberts, *Federal Liability of Carriers.*

series of questions which has given rise to much controversy has been due to the difficulty of determining when an employee should be held to be engaged in interstate commerce within the purview of the statute. The act itself has been amended several times and the Supreme Court has finally held that, as amended, the act lawfully gives the Federal right of action to an employee (or his beneficiary) of an interstate carrier, injured by a defective safety appliance on a car used in interstate commerce, even though the employee was not himself engaged in interstate commerce at the time of the injury.[1] This decision marked a judicial change of mind. In 1908 the Court had condemned the first Federal Employers' Liability Act because it expressly sought to accomplish the general result approved in 1916 as a legitimate end of the legislation. The dominant place of the Federal law was also emphasized when the courts held that, as to all injuries and deaths included with the conditions prescribed in the act, the remedy given by the statute is exclusive. All state laws are superseded in so far as they cover the same field. If the injury or death occurs under the circumstances defined in the act, there is no choice of remedy. Suit must be brought under the Federal law.[2]

§ 9. On February 28, 1920, Section 26 was added to the Interstate Commerce Act authorizing the Commission to require carriers to equip themselves with automatic train-stop or train control devices, or any other safety devices which the Commission might prescribe.[3] Orders under this section were required to be issued at least two years before the date specified for compliance.

For some years the Commission had watched experiments of the carriers with electrical and mechanical devices to eliminate the possibility of human error in running past stop signals. Congress by Joint Resolution on June 30, 1906, had directed the Commission to investigate and report. Many promoters appeared with forms of patented devices varying widely in cost, principle, and accomplishment. The essential safety function sought was an automatic device to compel obedience to a stop signal. The American Railway Association appointed a committee to co-

[1] Texas & Pacific Ry. Co. *v.* Rigsby, 241 U. S. 33.
[2] C. R. I. & P. Ry. Co. *v.* Wright, 239 U. S. 548.
[3] 41 Stat. L. 498.

operate in the investigation with the Bureau of Safety of the Commission. Some railroads at considerable expense equipped portions of their lines with forms of automatic train control devices, the basic principle of which was to cause the brakes to be set whenever the locomotive passed a stop signal. On June 13, 1922, the Commission, after a hearing upon an order to show cause why an order should not be entered, required each of forty-nine carriers in different portions of the country to equip a passenger division with some form of train control device, approved by the Commission, on or before January 1, 1925.[1] The Commission declared that the experimental period had passed and that the practicability of the automatic means of stopping trains had been demonstrated. The carriers urged that the sufficiency of the varying devices had not been tested long enough to justify the large expenditures required, that a device was of little worth unless it was one hundred per cent certain—otherwise enginemen would place false reliance upon it and it would induce rather than prevent accidents—and that an order would not be timely because the nature of any device required uniformity over the entire system to permit interchangeable use of locomotives, and no railroad was prepared to adopt finally any particular device for universal use. The Commission recognized in part the validity of these objections by restricting the scope of its order at this time to a single division on each of the railroads named. Meanwhile experimentation continues.[2]

These are the main Federal statutes dealing with safety of railroad operation, and they are comprehensive in their nature.[3]

[1] Automatic Train Control Devices, 69 I. C. C. 258.

[2] 36th Annual Report I. C. C. (1922), p. 23.

[3] Interference with the operations of the Federal laws relating to safety of train operation was made one of the grounds for injunctive relief sought by the Federal government against the striking railway shopmen in the bill for injunction filed in the United States District Court in Chicago on September 1st, 1922, in a proceeding entitled United States *v.* American Federation of Labor. Upon the filing of the bill the government immediately secured a temporary injunction restraining the striking shopmen and their officers from interfering in any manner with railway equipment or with workers engaged in the inspection or repair of such equipment conformable to the Federal safety laws. This was the first time in which these Federal laws have been used as a basis for injunctive relief against railroad workers who had left the service on strike. In addition the government bill was based upon alleged interference with the transportation of the mails, the same ground which was upheld by the Supreme Court in passing upon the injunction granted during the administration of President Grover Cleveland. In re Debs, 158 U. S. 564.

They have left little to state action within the field of regulation which they have undertaken to control. The states have, however, a considerable jurisdiction left to them on other matters. Thus the "full crew laws" of many states have been upheld as valid police regulations, these providing in general a minimum number of train employees who shall be engaged in the movement of any railroad train.[1] These laws have been upheld as safety regulations, although the contention of the railroad managers has been that they have been enacted as a result of effort by labor unions seeking to secure additional employment for their members.[2] It has also been held that the states may subject trainmen to state examination as to their qualifications.[3] The states also may regulate the manner in which the cars of passenger trains shall be heated.[4] The general rule is that wherever Congress has not specifically acted under its power to regulate interstate commerce, the states are still free to impose police regulations for the health, safety and morals of the people. But their action may not be arbitrary, it may not constitute a taking of property without due process of law, nor may it impose an undue burden upon, or interfere with the free flow of interstate commerce. When, however, Congress enters any new field of service regulation, its occupancy excludes of state action.

[1] C. R. I. & P. Ry. Co. *v.* Ark., 219 U. S. 453.

[2] "The number of men composing the crew for different lengths of trains and other operating conditions should be such as to insure the safety and convenience of passengers and crew and the safe and prompt carriage of freight, but legislative or regulatory requirements, whether by State or Federal agencies, which differ from each other and tend to increase operating cost, and to decrease the efficiency of operation should be minimized and the State and Federal authorities controlling operating practices should co-operate with a view to making uniform such requirements as may be necessary to insure the safety and convenience of passengers and crew and the safe and prompt carriage of freight." *Report of Joint Commission of Agricultural Inquiry; Transportation*, p. 418.

The report also, pp. 416–417, gives in detail the crew requirements of the various full crew laws in the 21 states in which such laws were effective at the time of the making of the report. Most of the laws had been passed in 1911, 1912, 1913, since which time three have been repealed. The Missouri law was repealed in 1914, the year following its enactment; the Pennsylvania and Indiana laws in 1921.

[3] Smith *v.* Ala., 124 U. S. 465; N. C. & St. L. Ry. Co. *v.* Ala., 128 U. S. 96.

[4] N. Y. N. H. & H. R. R. Co. *v.* N. Y., 165 U. S. 628.

CHAPTER XV

TRAINS AND TRAIN MOVEMENT

§ 1. In regulating safety of operation, the states and the Federal government have legislated concerning certain aspects of train movement. From the standpoint of adequacy of service, however, there has been comparatively little public interference with the railroad managers. The reason for this is not hard to find.

Railroad operation, especially as it involves the movement of trains, constitutes the most technical side of railroading. It is obviously no place for interference by amateurs. The stakes and the hazards are too large. Even during the period of Federal control the actual operation of the trains was left largely under the jurisdiction of those who had directed it in prior years.

The tremendous value of property in transit, dependent so much upon its safe and timely arrival,—to say nothing of the responsibility of railroad operators for human life, the preservation of the lives of passengers and employees alike—demands years of actual experience on particular railroads and an intimate knowledge of all variable conditions. On these matters there should be no division of responsibility between railroad officers and the public authorities. Prompt decisions of those in direct charge of railroad operation must be made to meet unexpected conditions and emergencies. Even train schedules, freight and passenger alike, must be flexible. Dependence upon routine, or the rigid compliance with fixed rules, eliminating opportunity for the application of managerial judgment, would cause disaster far more frequently than it would subserve public interest. From

these fundamental propositions, the conclusion is inevitable that no important phase of the railroad business should be less subject to regulation than the operations of railroad trains.[1]

Nor has there as yet been much public tampering with this technical side of the transportation business. Only one problem has seemed to stimulate public authorities to adopt specific regulations on the matter of adequacy of train service. This is the matter of stopping trains for the convenience of passengers and communities at points where the railroad schedules have not provided local stops for through trains. These regulations have led to much litigation and certain principles have been announced by the courts. But otherwise the railroad managers have been comparatively unhampered except where safety of operation has been involved.

§ 2. In the Transportation Act, 1920, however, the Interstate Commerce Commission is given a large reservoir of power, not as yet exercised, but full of potentialities of public interference with this technical side of the railroad business. "Car service," over which the Commission is given regulatory jurisdiction, is there defined to include among other things "the supply of trains" and the "movement of locomotives, cars and other vehicles used in the transportation of property." The carriers are required by the act to furnish "adequate" car service as this term is defined and to establish reasonable and just rules and practices in respect thereto. The Commission is given a reviewing authority, and the power by appropriate order to substitute its own judgment of reasonableness, justness and adequacy of service, for that of the railroad managers.

It will be interesting in the years to come to watch the Commission feel its way in developing principles to apply to situa-

[1] See note 2, p. 208, above, on embargoes. The Commission, Powell-Myers Co. *v.* St. L. I. M. & S. Ry. Co., 45 I. C. C. 594, 595–6, stated: "An embargo . . . is temporarily and to a limited extent a failure by a carrier to fulfill its obligation as a common carrier. Such failure is unlawful unless it has sufficient justification, and with respect to interstate traffic also violates that provision of the Act which requires that carriers subject thereto shall furnish . . . transportation upon reasonable request therefor." In Baltimore Chamber of Commerce *v.* B. & O. R. R. Co., 45 I. C. C. 40, 53, it was stated: "The advisability or the necessity of declaring embargoes is a matter of policy to be determined in the first instance by the carrier," citing Penn. R. R. Co. *v.* Puritan Coal Co., 237 U. S. 121, 133.

tions arising under this new authority. Just how far it can lawfully go in asserting powers over the control of trains and train operation must remain undetermined until a worth-while case is decided adversely to a private interest which will consider it desirable to appeal to the courts. Certainly the Commission has no clear precedents to guide it. Experience under the safety laws will be of little help in construing or applying the new statute. Where human life is involved the courts incline to uphold the obligations declared by public authority. Where mere intricate details of train operation are concerned and public authority attempts to substitute its own judgment for that of the railroad managers on matters of adequacy of service, the background is different. As a business privately owned and operated, except as it is affected by the public interest arising from the nature of its common carrier service, adequacy of the service is to be determined much the same as volume of production of any manufacturing plant is determined—by the best judgment of those ultimately responsible for the success of the enterprise. To measure adequacy of service apart from lucrative demand and use is to destroy the initiative of the railroad managers and their responsibility for the financial success of their enterprises. On the other hand, if the public has the right to regulate the reasonableness of the charge for service to be rendered, no logical differentiation suggests itself for denying to the public the right to regulate, at least in a general way, the amount and quality of service which shall be rendered for a given charge. Whether or not the present statute accomplishes this purpose is a question which can be answered only by the courts.

§ 3. Prior to the enactment of the Transportation Act, the Interstate Commerce Commission possessed broad powers in respect to unjust discrimination. The prohibitions upon the carriers as contained in Section 3 of the Interstate Commerce Act were declared by Mr. Justice Hughes to be "sweeping enough to embrace all discriminations of the sort described which it was within the power of Congress to condemn."[1] Under this section, complaint was made to the Commission that certain train service on Nebraska live stock to the Missouri River markets was unduly preferential to Omaha and unjustly discriminatory against St.

[1] Houston E. & W. T. Ry. Co. *v.* U. S., 234 U. S. 342, 356.

Joseph and Kansas City.[1] As a remedy, the complaining cities sought an order requiring the operation of additional trains. The carriers, so the Commission stated, urged "that we have no jurisdiction to require them to put on an additional train and further urge that the particular service sought is not warranted in any event by the likelihood of traffic that would result." The Commission avoided expressing its opinion on the jurisdictional objection by dismissing the particular complaint on the ground that the train service was in fact neither unreasonable nor unjustly discriminatory. On the other hand, in a case involving the transportation of milk in New England the Commission had found that the train service was unjustly discriminatory against the complaining party and awarded damages for past injuries which it found to exist.[2] Since there has been no attempt to prescribe the quantum of train service for the future, the extent of interference with the railroad managers through this medium thus far has been small. Such jurisdiction as exists has been exercised so infrequently as to be of little significance. The courts have never been called upon to pass upon the scope or the legality of such orders.

§ 4. Neither has the state regulation of adequacy of train service tended to impose onerous burdens upon the carriers.

Some of the state laws have, of course, been ridiculous. That is usually the result of petty local politics, especially when the embattled farmer attacks the state legislatures. Perhaps the extreme in this direction was attained by a Nebraska law of 1905. This law provided not only that the carriers must furnish free transportation for the caretakers of live stock, but that they must stop freight trains carrying live stock so that the caboose provided the caretakers should be located within a specified distance of the passenger stations of the railroad. It was then the duty of the conductor, or a specially designated employee, to show the passengers the location of the waiting room and to instruct them to remain there until called for. At train time or before, the railroad employee was required "to call at the waiting room and to show the passengers to their caboose or

[1] South St. Joseph Live Stock Exchange *v.* C. B. & Q. R. R. Co., 53 I. C. C. 114.

[2] Graustein *v.* B. & M. R. R., 45 I. C. C. 393.

car." In this fashion did the law provide not only for caretakers of live stock, but also for caretakers of caretakers of live stock.[1] Doubtless other equally absurd regulations adding to the cost of railroad operation could be cited. The only really significant state action, however, has looked in other directions—to the stopping of passenger trains, to increasing the number of trains, and to controlling the speed of trains, the last being generally exercised by municipalities in the interest of safety.

§ 5. The train stop statutes have been the most frequent form of service regulation undertaken by the public in respect to train movement. Communities, ambitious to secure trade or to add to local prestige, have sought extensions of train service, particularly as to passenger traffic, far in excess of current demand. In the heyday of raids upon the railroads as unpopular monopolies unresponsive to the public interest, the enactment of laws requiring the stopping of through trains at local points was a frequent exercise of "legislative discretion." Usually these statutes required all trains, or a certain number of trains each day, to be stopped for the receipt and discharge of passengers at cities having a specified population, or at county seats. The strength of local political pressure can well be understood under these circumstances. Every ambitious politician, or "booster," sought to improve railroad service in his own locality, regardless of the cost to the railroads. Some of the regulations were upheld, and some were set aside either as constituting undue burdens upon interstate commerce, or as being unreasonable requirements in the light of the necessities of the public. The law is now fairly well settled that the courts have a right to review laws or orders of this character to determine whether: (1) they constitute undue burdens on interstate commerce; or (2) they are arbitrary and unreasonable requirements measured by the public interest involved and the cost to the railroad.

The Supreme Court did not pass upon the validity of a state statute requiring the stopping of trains at a particular class of

[1] It was currently reported at the time of the enactment of this statute that several live stock shippers, who had been marooned over night at a station by reason of the train crew moving the train while they were enjoying themselves about the city, brought pressure on the legislature to force the enactment of the law. It was modified to a less drastic form by the Nebraska legislature in 1921.

stations until 1898. Then the legality of an Ohio statute of 1889, requiring railroads to stop three through passenger trains each way each day, if so many were run, at all cities and villages having a population of three thousand or more, was in question. The statute was attacked as an undue interference with interstate commerce. But, by a five to four decision, the law was upheld as a valid exercise of the police power of the state, the Court declaring that the effect upon interstate commerce was so remote as not to amount to an undue burden. The dissenting opinion of Mr. Justice White is, however, rather more significant than the majority opinion, since it contains the doctrine which was later voiced as the law by a new majority of the Court. This doctrine was restated in the later opinion as the law, as follows:

> "The interstate trains of the railroad are required by the necessities of its interstate business. It is in competition with shorter roads and the speed of its trains which cannot be safely increased, and the schedule time, are a necessity in this competition. This conformity to conditions must be strained or embarrassed; and it may be prevented, in order to give greater facilities than one train a day each way to villages having a post office and two hundred inhabitants, not necessarily because they are not properly served, but seemingly to give them a larger division of service."[1]

Under this doctrine the right of the state to require the stopping of trains indiscriminately is limited. Whether or not such a statute creates an undue burden against interstate commerce is a question for the courts under the particular facts of each case.[2] Where the state seeks to measure the quantum of local service by the number of through trains, the burden upon interstate commerce has been held to be undue. The adequacy of train service, so far as it affects the stopping of trains, is, therefore, rather to be measured in terms of the volume of demand, than in terms of the volume of possible supply. This is a sound rule.

§ 6. Regulations of the speed of trains, aside from municipal ordinances prescribing maximum rates of speed within city or town limits as safety measures, have not been generally adopted. Speed is necessarily a detail of operating routine governed by

[1] C. B. & Q. R. R. Co. *v.* Wis. R. R. Com., 237 U. S. 220, 230; the earlier case is Lake Shore & Michigan Southern Ry. Co. *v.* Ohio, 173 U. S. 285. Mr. Justice White's dissenting opinion begins at page 334.

[2] St. L. & S. F. Ry. Co. *v.* Mo. P. S. Com., 254 U. S. 535, 536.

peculiar conditions always subject to change, and extremely difficult to regulate in any practical way. Most of the requirements have been purely local, seeking to limit the speed of trains operating at grade in congested urban centers, in the interest of the safety of the resident population. But a standard of speed performance is very difficult to fix because of the necessity to meet operating needs at a particular time. Nevertheless, live stock growers in Nebraska, seeking to speed up live stock shipments, a class of movement in which time is frequently an important factor, both in maintaining quality and "making" a particular market, induced the same Nebraska legislature of 1905, which had provided caretakers for caretakers, to enact a statute providing for the maintenance of a minimum speed on live stock trains. This was fixed at eighteen miles per hour on main lines and fourteen miles per hour on branch lines. Shippers were given a right to damages for violation of the statute at the rate of $10 per car for each hour of delay.[1]

§ 7. The states have also frequently undertaken, through the medium of their railroad commissions, to prevent abandonment of train service once established. In some states, passenger trains may not be withdrawn without permission of the state authorities. The Supreme Court has on occasion upheld the validity of state action requiring the running of trains in addition to those provided by the carriers.[2] But the courts will scrutinize such orders, when they are attacked, to determine whether they are so arbitrary and unreasonable as to prevent the carrier from earning a fair return on its property. On this ground a recent order of the Mississippi Commission requiring the restoration of six trains a day on a branch of the Mobile & Ohio Railroad was declared void.[3]

This discussion of regulation of train service shows that there have been comparatively few encroachments upon the railroad managers in this field. Doubtless the technical nature of the

[1] The Nebraska Supreme Court upheld the constitutionality of this statute. Cram *v.* C. B. & Q. R. R. Co., 84 Nebr. 607. It was, however, later modified and made less burdensome. Inasmuch as it failed to exempt the carrier from liability in the event of unavoidable accident and also because it affected interstate commerce directly, it is doubtful whether it would have stood the test of the Federal courts.

[2] A. C. L. R. R. Co. *v.* N. C. Corp. Com., 206 U. S. 1.

[3] Miss. R. R. Com. *v.* M. & O. R. R. Co., 244 U. S. 388.

problems involved will continue to slow up aggressive regulation in this direction. Unless the abuses of private control become very great, or there is a great revulsion of feeling against private initiative, the operation of the freight and passenger trains will doubtless be left to those officers who are selected by the corporations to assume this responsibility.

CHAPTER XVI

CAR SUPPLY AND CAR DISTRIBUTION

§ 1. The car service provisions of the Interstate Commerce Act are primarily of emergency importance. Always a supply of cars is prerequisite to the carrying of goods, and the obligation to furnish cars is, in usual times and for most classes of traffic, promptly met. It has been periods of car shortage which have given rise to dispute and litigation, disclosing problems which regulation has attempted to anticipate and minimize. Complaints of discrimination and preference in the distribution of available cars during car shortages have compelled attention. The pressure upon railroad managers, especially from large shippers, was frequently too much to withstand. Some unfortunate occurrences, involving even petty bribery, have focused attention upon the possibility of an evil which always became most acute when equality of treatment was least easy to attain.

But is not a condition of car shortage incompatible with performance of the obligation to furnish service? Can there be a condition of car shortage if the railroad possesses an adequate supply of cars? The contradiction in terms is apparent; and yet, as a practical matter, the contradiction is one only in terms. So long as the business cycle, the swing of general business through prosperity to depression and back to prosperity again, results in alternate periods of traffic plenty and scarcity, so long must the railroads face a certainty of car shortage and car surplus. In addition, seasonal peaks due to crop movement, demands for coal varying with hard and mild winters, and seasonal swings in general business, must be recognized. Freight yards, during 1921 and the first eight months of 1922, were filled with freight

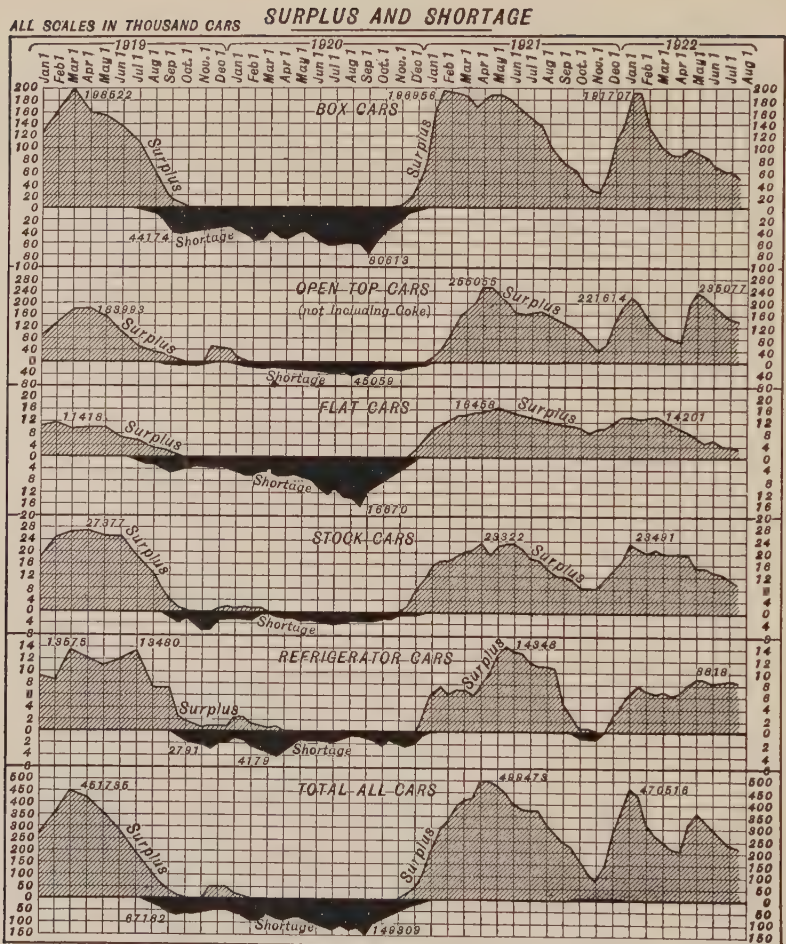


PLATE 19.—Car Surplus and Car Shortage, 1919-1922.

Based on American Railway Association, Information Bulletin No. 41, July 27, 1922

cars, rusty and disconsolate, idle because of a lack of demand for railroad service. Two years before, these cars were part of a supply which had proved inadequate to meet demands.

The service obligation might be interpreted to require that the carriers have on hand a sufficient supply of cars to meet even the maximum anticipated peak load. Thus far it has not been

so interpreted, and until this has been done, it is grossly unfair to criticize railroad managers for recurring periods of temporary car shortage. Public policy may decide to require an anticipation of peak demand, but it cannot so decide without appraising the relative economic loss from car shortage as compared with the loss when capital is tied up in idle equipment.[1]

In Interstate Commerce Commission *v.* Illinois Central Railroad Company, the Supreme Court said:

> "Notwithstanding full performance by railway carriers of the duty to have a legally sufficient supply of coal cars, it is conceded that unforeseen periods arise when a shortage of such cars to meet the demand for the transportation of coal takes place, because, among other things, of the wide fluctuation between the demands for the transportation of bituminous coal at different and uncertain periods; the large number of loaded coal cars delivered by a carrier beyond its own line for transportation over other roads, consequent upon the fact that the coal produced at a particular point is normally distributed for consumption over an extensive area; and because the cars thus parted with are subject to longer detentions than usually obtain in the case of shipments of other articles, owing to the fact that bituminous coal is often shipped by mining operators to distant points, to be sold after arrival, and is hence held at the terminal points awaiting sale, or because, owing to the cost of handling coal, and the difficulty of storing such coal, the car in which it is shipped is often used by the shipper or purchaser at the terminal points as a convenient means of storage, or as an instrument for delivery without the expense of breaking bulk, to other and distant points."[2]

Certainly the general attitude of the law is that the obligation to furnish cars is only a relative obligation after all. It is the obligation to furnish a supply of cars adequate to meet the usual

[1] The Joint Commission of Agricultural Inquiry discusses the problem of distribution of cars for grain loading in its report:

"The grain-originating railroads generally endeavor to assemble a supply of suitable box cars before the grain is ready to move. This is accomplished by assembling their own cars, as well as such suitable foreign equipment as may be found upon the line; and generally the supply thus assembled is sufficient to move a very considerable quantity of grain. Inevitably, however, because of the slow return movement by connecting lines, a shortage develops in the grain-originating territory before a large part of the grain has been moved . . . A shortage of box cars is much more pronounced in the grain-shipping months of September, October, and November; and in no year of record have orders for cars been fully supplied during these months." *Report of the Joint Commission of Agricultural Inquiry: Transportation*, p. 262.

[2] 215 U. S. 452, 460.

demands of the probable traffic. Ordinarily a shipper, on reasonable demand, is entitled to all the cars he can promptly load with freight. But the United States Supreme Court has recognized that the carrier is not liable for damages if the failure to furnish cars is the result of sudden and great demands which it had no reason to apprehend would be made, and which it could not reasonably have been expected to meet in full. This rule is simply the logical extension of the original concept of the common law rule that, while a carrier is bound to receive all goods and passengers, this obligation is subject to the limitation that, "if his coach be full," he is not liable for failing to transport more than he can carry.

And yet the results of car shortage are too far-reaching to permit mere falling back on an excuse good before the bar of law, perhaps, but not good before the bar of public opinion.[1] As a matter of practical railroad policy, the managements must seek to anticipate equipment demand if this is at all possible. It is, therefore, no happy task which the railroad manager faces, even if the credit of his company permits a free hand, when he undertakes to provide for the probable requirements, and, at the same time, seeks to avoid an accumulation of idle equipment on sidings and in the terminals of his company. An investment beyond the normal needs of the shipping (or traveling) public would result in injury to railroad owners (his employers) thus compelled to pay fixed charges on unnecessary equipment,[2] an investment below the level needed places the entire industrial life

[1] In the car supply investigation of 1917 the Interstate Commerce Commission described the effect of an increase in traffic beyond the capacity of the railroads to provide cars as follows: "The present conditions of car distribution throughout the United States have no parallel in our history. In some territories the railroads have furnished but a small part of the cars necessary for the transportation of staple articles of commerce, such as coal, grain, lumber, fruits, and vegetables. In consequence mills have shut down, prices have advanced, perishable articles of great value have been destroyed, and hundreds of carloads of food products have been delayed in reaching their natural markets. In other territories there have been so many cars on the lines of the carriers and in their terminals that transportation service has been thrown into unprecedented confusion, long delays in transit have been the rule rather than the exception, and the operation of established industrial activities have been made uncertain and difficult." Car Supply Investigation, 42 I. C. C. 657, 661.

[2] Under the rule of rate making the public would be expected to pay higher freight rates to constitute a fair return upon the additional investment.

of the nation in precarious position. If business falls off so that there is idle equipment, the railroad manager faces criticism from directors and stockholders, and even from the regulatory commissions. If an increase of traffic develops beyond his ability to take care of it at once, criticism is likely to take the form of abuse. "Inefficient" and "incapable" would be mild epithets for street corner orators and partisan editors.

As the law recognizes that the carriers are entitled to a fair return upon the property devoted to the public use, the purchase of cars sufficient to take care of the peak load in the fall of the year would greatly increase the investment of the carriers. Consequently the amount which the public would be required to pay in freight charges to constitute a fair return would likewise be increased. For example, it has been asserted that the investment of a carrier in cars and facilities to serve a new coal mine is frequently greater than the investment in the mine itself. This fact, of obvious importance to the public, is one of the matters to which the Coal Fact Finding Committee, constituted by Act of Congress in 1922 to investigate matters concerning the production and distribution of coal, has given consideration.

To meet the demand of purely seasonal peak loads the carriers coöperate to mobilize cars at points of shipment. Carriers which are to participate in the line hauls frequently turn empties over to their connections, in order that the needed rolling stock may be available. This is necessary as a matter of reciprocity. The Interstate Commerce Commission holds that it is unreasonable, through the medium of an operating rule for a carrier to attempt to restrict cars to its own rails by requiring unloading of its own equipment at its terminal and the transfer of freight moving on through rates.[1]

§ 2. The existence of this general scheme of car interchange has created a necessity for intercarrier accounting and payment. These are effected in accordance with a set of rules, voluntarily agreed to by the carriers, known as the *per diem* agreement. The general purpose of these rules is to provide a charge, in 1922 one dollar a day (it began with twenty cents in 1902), made against the carriers on whose lines the car is located, and paid

[1] Omaha Grain Exchange *v.* Great Northern Ry. Co., 47 I. C. C. 532; see also Missouri & Illinois Coal Co. *v.* I. C. R. R. Co., 22 I. C. C. 39.

in monthly balances to the owning carrier. In times of normal traffic this requirement constitutes a stimulus for the prompt release and return of foreign line equipment. In times of car shortage, when cars are at a premium, and, the more cars a railroad has the greater revenue it can earn, the *per diem* rule hardly constitutes a particularly great deterrent to the retention of cars owned by other carriers. It is, however, probably the best method which can be devised to protect a railroad providing an adequate supply of cars against the depletion of its supply by a failure of other carriers to return equipment.[1] If this method should fail completely, railroad regulation will be compelled to take entire control of this matter of car interchange. This exigency has not, however, yet occurred.

§ 3. For certain seasonal peak loads, the existence of reservoirs of special classes of equipment largely privately owned is important.[2] Pullman sleeping cars are mobilized to meet the

[1] In the car shortage investigation of 1907, 12 I. C. C. 561, 573, Commissioner Lane commented on the function of the *per diem* agreement as follows: "It is not many years since the railroad which originated freight transferred at its junctions to the cars of the connecting road. Each railroad was thus made to supply its own equipment. This was an uneconomical and time-wasting method, and so out of their own necessities and to give a prompter service the railroads developed the practice which generally obtains today of permitting cars to pass onto the tracks of their connecting roads and making a *per diem* charge therefor. Under this system the present method of hauling freight over several connecting roads has made possible that great body of through transportation which is perhaps the most distinctive feature of American railroading. Experience has proved, however, that the rules governing the return of cars were evaded to such extent that not a few railroads relied upon foreign equipment for their own needs.

"Realizing that a charge of 20 cents per day was insufficient penalty, over 100 railroads within this month have raised the *per diem* to 50 cents. That this will be effective in securing return of cars to the owning railroads during the few months of the year when traffic is light may be conceded, but that it will insure return during times of great need is not likely, for in such times the holder could earn perhaps ten times the amount that he would be compelled to pay by using the foreign car."

[2] The number of privately owned cars in the United States was given by the Joint Commission of Agriculture Inquiry in 1922 as follows:

Box cars	766
Stock cars	3,878
Coal cars	28,615
Flat cars	1,410
Tank cars	132,465
Refrigerator cars	56,124
All other cars	2,466
Total	225,724

Most of these cars are of modern construction and suitable for trans-

demands of travel at different seasons and in different sections. In this fashion the tourist traffic is handled without overloading a railroad with equipment not usable during a considerable season. The two outstanding railroads which operate their own sleeping cars, the St. Paul and the Soo Line, are not greatly affected by seasonal peak loads of this character. The same principles are at work in the supply of refrigerator cars. Demand for their use is general during seasons when citrus fruits and fresh garden truck are moving, and they are heavily utilized for transporting potatoes during the winter months when the insulation, useful to keep out heat in summer, serves to keep out the winter cold. Tank cars, originally developed on a large scale for carrying petroleum and petroleum products, have had the scope of their use widened to include transportation of many other commodities, vegetable oils, molasses, glucose, tanning extracts, chemicals, and all liquids in bulk. The general scheme of compensation for special equipment of this character is for the shipper to pay the regular transportation charge to the railroad, and, in some instances, when required by tariffs, to pay a rental charge to the company providing the equipment. Usually, however, only the railroad company which transports the car pays a mileage charge to the owner of the equipment,—in other words, it rents the car from a car company.

The Transportation Act, 1920, sought to change the status of the obligation of the carriers to furnish cars, meeting the needs of certain classes of traffic for specialized equipment. Some years ago the Interstate Commerce Commission undertook to require the Pennsylvania Railroad Company to equip itself with tank cars for its patrons. That railroad had relied almost entirely upon private companies to supply this equipment. The United States Supreme Court held that under the law as it then stood, the Interstate Commerce Commission was without power to require the purchase of additional equipment.[1] In conformity with this decision the Interstate Commerce Commission later held that, in the absence of discriminatory practice, it was without power to

portation of various products in any of the freight trains, the same standard of construction and maintenance being followed as in the case of railroad-owned equipment. *Report of Joint Commission of Agricultural Inquiry: Transportation*, p. 237.

[1] United States *v.* Penn. R. R. Co., 242 U. S. 208.

require railroad companies to equip themselves with refrigerator cars.[1] But subsequent amendments of the Interstate Commerce Act include, within the definition of "car service," which carriers are required to furnish and which the Interstate Commerce Commission may regulate, the "supply" of cars and "other vehicles used in the transportation of property, including special types of equipment." Whether this addition to the jurisdiction of the Interstate Commerce Commission is sufficient to enable that body to require a particular carrier to increase the number of its cars or to provide itself with special types of cars can be determined only by the courts. Within the limits of their financial ability, there is always strong economic pressure upon carriers to keep their car supplies adequate to the needs of their shippers.

§ 4. The principles developed to govern situations of car shortage are not new, nor are they involved in their implications. Rules of car distribution must be reasonable; they may not be unduly preferential nor unjustly discriminatory; they must be published, when required by the Commission.[2] Such regulations as the Interstate Commerce Commission may establish are exclusive of any requirements made by the states, and to the extent that the latter are inconsistent with the former, state requirements are abrogated. Some states have, indeed, legislated in respect to the furnishing of cars, but the Supreme Court, in passing upon the Minnesota statute which provided a penalty of one dollar per car per day for failure to furnish cars, held that the state could not lawfully impose penalties of this character without interfering with interstate commerce.[3] It is impossible to segregate cars as between those which are used in intrastate commerce and those which move beyond the borders of a state. And, since cars are thus used interchangeably in intrastate and interstate commerce, problems of car distribution ultimately must be passed upon by the Interstate Commerce Commission, or great congestion and confusion will result. It has come to be understood that the regulation of car distribution is a national matter, and can be handled adequately only as such.[4]

[1] R. R. Com. of Fla. *v.* Sou. Express Co., 44 I. C. C. 645.
[2] Sec. 1, Par. 13, Interstate Commerce Act.
[3] C. R. I. & P. Ry. Co. *v.* Hardwick Farmers' Elevator Co., 226 U. S. 426.
[4] Penn. R. R. Co. *v.* I. C. C., 193 Fed. 81.

In some industries, car shortages are seasonal, and in no industry have general car shortages been more recurrent than in the bituminous coal mining industry, which has a highly seasonal peak. This industry produces a commodity so low in value that the price will not "stand" frequent rehandling; coal is, moreover, a commodity which deteriorates in storage, (low grade bituminous and lignite coals can seldom be stored except under water), and coal is a commodity requiring specialized equipment for its economical movement. It is not accidental, therefore, that controversies of car distribution before the Interstate Commerce Commission have very largely concerned alleged discriminatory practices in distributing coal cars. Only the mine that has cars operates continuously. In crop moving times there have been some complaints relative to the supply of grain cars, and to the method of their distribution. But these, comparatively speaking, have been unimportant. The coal trade, and especially the bituminous coal trade, has been the storm center.

At least as important as the primary duty of the carrier to provide just and reasonable rules for car distribution, under supervision by the Interstate Commerce Commission, is the obligation to apply these rules without discrimination or preference. Complexity has been added to the difficulties of the situation when, as is oftentimes the case, a single mine relies upon more than one carrier for its car supply. It has been necessary to devise a method by which such a mine will not be unduly preferred over those mines located on the rails of a single carrier. The courts have permitted shippers to recover damages in large sums where it has been shown that railroad companies have failed to apply uniformly rules adopted by themselves, or prescribed by the Interstate Commerce Commission. Where the damages were sought on account of unreasonable rules, the courts held that the shippers must first secure an award of reparation from the Commission, but where the damages were claimed by reason of a discriminatory application of the rules, the courts in many cases awarded damages in the first instance without requiring the shipper to appeal to the Commission.[1]

The Interstate Commerce Act fixes the duty of the carrier to

[1] Morrisdale Coal Co. *v.* Penn. R. R. Co., 230 U. S. 304; Penn. R. R. Co. *v.* International Coal Mining Co., 230 U. S. 184.

maintain and apply just and reasonable "ratings" for mines. The purpose of fixing a mine rating is simply to set the basis upon which each mine shall share in the available equipment when there is not sufficient to meet the entire demand. In some instances the rating has been determined by the past performance of the mine, while in other cases it has been determined by the physical "capacity" or output. In an investigation concerning mine ratings on the Illinois Central, conducted in 1912, the Commission approved what was there described as "the hourly production basis for rating." This method, in effect, fixed ratings for stated periods by dividing the tonnage produced in each mine by the number of hours worked. This gave a method of rating based on past performance.[1] The Commission's approval of the method was, however, limited to the peculiar set of conditions disclosed in the particular investigation.[2] No rule was then approved for general use, and not until 1922 did the Commission undertake a general investigation to define a fixed rule for uniform application.[3] But, in general, the chief difficulties have arisen less in the determination of a method of rating than in the application of the method in use.

§ 5. From the nature of the case, the situation of the railroads is a difficult one. They use approximately 28 per cent of the total coal production. They are both purchasers and carriers of coal. They have even been miners of coal. In times of coal shortage, regulatory bodies have recognized continued operation as the first duty of railroads. Their right to secure a fuel supply, since without fuel they cannot operate, has, therefore, been of paramount public importance. Their practice, in distributing

[1] In re Irregularities in Mine Ratings, 25 I. C. C. 286.

[2] In McCaa Coal Co. *v.* Coal & Coke Ry., the Commission said: "It is our opinion and finding that the distribution of coal cars based upon the element of physical capacity is wholly unsatisfactory and works injustice. The best basis for the distribution of cars in this case is the proportionate necessities of the mines, as indicated by past performances, extending over periods of car shortage as well as periods of free distribution. No basis of distribution can be absolutely precise. It is not necessary, however, to imagine anything or to deal in speculations or possibilities." 30 I. C. C. 531.

The allusion is to a system of mine ratings based upon the "reported number of working places," which, in its effects, operated to the advantage of a company operated by the interests which then controlled the railroad.

[3] Order dated June 17, 1922, inaugurating a general investigation entitled, "In re rules governing ratings of coal mines, other than anthracite, and the distribution of cars to such mines."

coal cars, to claim the right to furnish cars for railway fuel in preference to cars loading fuel for commercial purposes, gave rise to the so-called "assigned car rule" and to considerable litigation in respect to it. Regulations of the railroads dealing with the distribution of coal cars to mines during car shortages are concerned with four classes of cars:

(1) Commercial Loading Cars—the cars of the carrier serving the mine or of its connections, which are available for the commercial transportation of coal;
(2) Company Fuel Cars—cars belonging to the railroad serving the mine, and assigned to the transportation of coal which has been bought by the carrier for fuel purposes;
(3) Foreign Railway Fuel Cars—cars owned by other railroad companies, which have delivered them to the carriers on whose line mines are situated for the purpose of enabling the cars to be loaded with railway fuel coal to be returned to the company owning the car;
(4) Private Cars—cars own or leased by coal mining companies or shippers, or consumers, and used for the benefit of owners or lessees in conveying coal from mines to designated points of delivery.

As previously noted, coal cars in times of shortage are distributed to the mines based upon the relative mine "ratings." Thus a mine with a rated capacity of forty cars a day will receive twice as many cars in times of car shortage as the mine whose rated capacity is only twenty cars a day, even though neither of the mines receives cars equal to its full rating. In order to insure themselves of a sufficient fuel supply, the carriers adopted regulations seeking to exclude from the computations of cars furnished to coal mines, all cars other than those for commercial loading. Company fuel cars, foreign railway fuel cars, and private cars were designated as "assigned cars." The railroad companies formerly undertook to furnish "assigned" cars to mines without regard to the number of cars furnished for commercial loading. Thus they sought to distribute the cars available for commercial loading based upon the *pro rata* share of each mine, as determined in the light of its rated capacity, wholly without regard to whether or not any of the assigned cars had been so delivered. The Interstate Commerce Commission in several decisions condemned this practice.[1]

[1] R. R. Com. of Ohio *v.* H. V. Ry. Co., 12 I. C. C. 398; Traer *v.* C. & A. R. R. Co., 13 I. C. C. 451. The Commission's orders were subsequently

The rules adopted in conformity with the decisions of the Interstate Commerce Commission now provide that where the number of assigned cars placed at a mine during any period equals or exceeds the mine's *pro rata* share of the available car supply, it shall not be entitled to any unassigned cars.[1] This means that it shall not be entitled to receive any cars for commercial loading. But if the number of assigned cars placed at a mine during a period of car shortage is less than its *pro rata* share, it may receive cars for commercial loading to an extent sufficient to make up its *pro rata* share. The fuel needs of the railroads are provided for by permitting the carriers to furnish as many assigned cars to a mine as they desire. This rule holds even though the number of assigned cars so furnished to a mine may exceed the number of cars which the mine would be entitled to receive for commercial loading. This has been held not to amount to discrimination because necessary to enable the railroads to operate. It does, of course, enable those mines, whose principal business is the furnishing of railroad coal, to operate to a greater capacity during a period of car shortage than mines which deal only in commercial coal. The National Coal Association, an association of coal operators, has bitterly opposed this practice, contending that railroads have utilized the privilege of assigning cars for railroad fuel loading as a club to compel coal operators to sell their coal at subnormal prices in order that they may operate at full capacity. The charge has never been proved.[2]

The other class of equipment, the distribution of which has given rise to serious dispute in times of car shortage, is equipment for the transportation of grain. There has been no agreement as to a proper rule even among the grain shippers themselves. Some have contended that grain cars should be distributed on the basis of past performance of the elevators. Other shippers have contended that the distribution should be made entirely upon the amount of grain on hand and ready for shipment without regard to the principle of "past performance." Obviously the

upheld by the Supreme Court: I. C. C. *v.* Illinois Central R. R. Co., 215 U. S. 452.

[1] Northern West Virginia Coal Operators' Asso. *v.* P. & L. E. R. R. Co., 68 I. C. C. 167.

[2] See In re assignment of Freight Cars, 57 I. C. C. 760 and Lambert Run Coal Co. *v.* B. & O. R. R. Co., 42 Sup. Ct. Rep. 349.

elevators which have been in operation for a considerable period of time would have a decided advantage over new competitors under a rule which sought to distribute cars in times of railroad car shortage, on the basis of past performance of elevators. There is an echo of the fight of the "line" elevator and the farmer's elevator in all this. The Interstate Commerce Commission has expressed itself as favoring the method of distribution which is more liberal to the new competitor: "according to demand and grain ready for shipment, rather than on a basis of past performance." [1]

§ 6. So much then for the carrier's duty; what are the duties of shippers in connection with car service? It is their duty as shippers to load and unload the cars promptly and to release equipment for further use in transportation. This obligation on the part of the shipper, especially the obligation to unload promptly, has been enforced, with the consent of the Interstate Commerce Commission and the state commissions, by demurrage or track penalties published in tariffs and assessed against the shipper or consignee for failure to load or unload promptly.

Demurrage was originally an allowance or compensation for the delay or detention of a vessel.[2] The term was extended to cover charges for detention of vehicles used by common carriers by land, including railroads. At the present time, railroads assess demurrage charges against shippers for the detention of cars or by consignors or consignees for any purpose including loading and unloading, or pending forwarding directions.[3] The

[1] R. R. Com. of Iowa *v.* C. R. I. & P. Ry. Co., 29 I. C. C. 396; Farmer's Elev. Co. *v.* C. M. & St. P. Ry. Co., 47 I. C. C. 475; Tanner & Co. *v.* C. B. & Q. R. R. Co., 53 I. C. C. 401; Hobart Mill & Elev. Co. *v.* Director General, 61 I. C. C. 192.

[2] Am. & Eng. Encyc. 223; 10 Corpus Juris 464; Southern Ry. Co. *v.* Melton, 133 Georgia, 277, 293; 65 Southeastern 665, 672.

[3] Prior to 1909 there was no uniformity in demurrage charges. At the present time, however, demurrage throughout the country is governed by a Uniform Demurrage Code, adopted in that year, and including changes made since that date.

The history of the uniform demurrage rules is stated as follows in Swift & Co. *v.* Hocking Valley Ry. Co., 243 U. S. 281, 283: "The National Convention of Railway Commissioners, an association comprising the commissioners of the several states, adopted in November 1909, a Uniform Demurrage Code. Its action was based upon extensive investigations and thorough discussion, participated in by the railroad commissioners, commercial organizations, representatives of railroads and individual shippers from all parts of the country. On December 18, 1909, the Interstate Com-

Commission has for many years exercised jurisdiction over demurrage charges and storage charges, and the courts have referred with apparent approval to its rulings.[1] It was declared by the Commission at an early date that a railroad was a common carrier whose duty it was to transport freight to destination and deliver it to the consignee, not to provide storage for shippers; and that a reasonable demurrage charge should not be based simply upon a fair rental value of the car, but should include a penalty charge sufficient to secure the prompt release of the car for use by other shippers.[2] It is not the function of a common carrier to act as a warehouseman.[3] To reinforce the demurrage charges, track storage charges frequently are imposed in large terminals and have been sustained in a number of cases.[4] As indicated by the Supreme Court:

merce Commission endorsed the rules so adopted and recommended that they be made effective on interstate transportation throughout the country. In re Demurrage Investigation, 19 I. C. C., 496."

[1] Swift & Co. *v.* Hocking Valley Ry. Co., 243 U. S. 281; Penn. R. R. Co. *v.* Kittaning Co., 253 U. S. 319, 323, 325; United States, *v.* Erie R. R. Co., 209 Fed. 283; Seaboard Air Line Ry. Co. *v.* New Orleans Export Co., 271 Fed. 861, 863; Sinclair Refining Co. *v.* Schaff, 275 Fed. 769.

[2] Kehoe & Co. *v.* Charleston & W. C. R. Co., 11 I. C. C. 166, 169; N. Y. Hay Exchange Asso. *v.* P. R. R. Co., 14 I. C. C. 178, 184; Wilson Produce Co. *v.* P. R. R. Co., 16 I. C. C. 116, 122; Turnbull Co. *v.* Erie R. R. Co., 17 I. C. C. 123; Peale, Peacock & Kerr *v.* C. R. R. of N. J., 18 I. C. C. 25, 36; Pittsburgh & Ohio Mining Co. *v.* B. & O. R. R. Co., 40 I. C. C. 408.

A thorough discussion of the demurrage rules would assign to this subject a disproportionate amount of space. In general, the rules describe the cars which are subject to the rules, they indicate the "free time" allowance—the period allowed without charge for loading or unloading—, and provide a method of computing time. Other details considered cover giving notice of arrival, placing cars for loading or unloading, the amount of the charges, any exceptions to the rules imposing demurrage, such as railroad errors, weather interference, or other matters recognized by the rules as affording good reason for not applying the charges. Finally, there is the so-called "average agreement." This is a contract form, published and filed with the Commission as a part of the uniform rules, under which the charge for detention of cars, on all cars subject to demurrage, held for loading and unloading, is computed on the basis of the average time of detention to all such cars released during each calendar month by the shipper executing the agreement. In other words, it enables the shipper to offset against the debits due to detention of cars, credits secured through unloading cars in less than the free time allowed. It is very generally used by large shippers.

[3] Advances in Demurrage Charges, 25 I. C. C., 314, 315; Virginia Coal, Iron & Coke Co. *v.* Director General, 61 I. C. C. 200.

[4] Wilson Produce Co. *v.* P. R. R. Co., 14 I. C. C. 170; New York Hay Exchange Ass'n. *v.* P. R. R. Co., 14 I. C. C. 178; Wilson Produce Co. *v.* P. R. R. Co., 16 I. C. C. 116; Turnbull Co. *v.* Erie R. R. Co., 17 I. C. C. 123; Murphey Brothers *v.* L. I. R. R. Co., 26 I. C. C. 413; Milwaukee Produce & Fruit Exchange *v.* C. & N. W. Ry. Co., 35 I. C. C. 33.

"The purpose of demurrage charges is to promote efficiency by penalizing undue detention of cars. The aim of the code was to prescribe rules, to be applied uniformly throughout the country, by which it might be determined what detention is to be deemed reasonable."[1]

In order to accomplish this purpose, progressive demurrage charges, increasing with each day of delay, were inaugurated during Federal control. Even these did not always suffice.[2]

§ 7. Another type of controversy in respect to the use of cars has arisen in connection with the assertion by certain shippers of the right to use cars at destination for purposes not connected with the transportation or unloading of freight. Thus a number of years ago in Pittsburgh various produce dealers sought to use railroad cars as merchandising places for the disposition of their produce, conducting sales of fresh fruits and vegetables on the railroad premises. The Interstate Commerce Commission condemned this practice.[3] In a later day, farmers' associations, local merchants, and even itinerant merchants in Kansas and Nebraska sought to utilize freight cars in railroad yards for the barter and sale of commodities. The farmer organizations bought coöperatively supplies of salt, binder twine, lumber, coal, and stock feed. Surplus and unsold goods were then sold from the car. The local merchants handled these, and fruits and vegetables as well. The itinerant merchants were almost exclusively dealers in the latter classes of commodities. The Commission again held that the carriers were entitled to make rules which would prevent such abuse of equipment provided for transportation purposes.[4] They were under no duty to permit the use of cars in this manner. Cooperative purchase and sale were not condemned; but resale from the car was condemned. Obligations rest upon shippers as well as upon carriers.

[1] Penn. R. R. Co. *v.* Kittaning Co., 253 U. S. 319, 323.

[2] Export Freight Free Time, 47 I. C. C. 162; Lowery Lbr. Co. *v.* Director General, 58 I. C. C. 113; 59 I. C. C. 90; Wharton Steel Co. *v.* Director General, 59 I. C. C. 613.

[3] Southwestern Produce Distributors *v.* Wabash R. R., 20 I. C. C. 458.

[4] Car Peddling Case, 45 I. C. C. 494.

CHAPTER XVII

THROUGH ROUTES AND ROUTING OF FREIGHT

§ 1. The right of a shipper to control the routing of his freight over particular lines of railroad is clearly defined by the Interstate Commerce Act. Wherever two or more through routes are available, the shipper, subject to the Commission's regulations, has the right to designate, in writing, by which of the through routes his property shall be transported. Such a through route exists if connecting carriers, by an arrangement, expressed or implied, create a continuous line of railroad over which freight or passengers will be transported. It does not necessarily involve a joint rate.[1] When a published tariff contains no provision lim-

[1] Through Routes and Through Rates, 12 I. C. C. 163, 166. In this case it was said:

"A through route is a continuous line of railway formed by an arrangement, express or implied, between connecting carriers. It must have a rate for every service it offers, and, as the route is a new unit—one line formed of two or more connecting lines—so its rate for every service is a unit, even though it be divided between the several carriers arranging themselves into the through route. As was said by the Commission in Brady *v.* P. R. Co., 2 I. C. C. Rep., 131, 'through carriage implies a through rate.' This is equally true whether the through rate be published as a whole by the joint action of the connecting carriers, or, in the absence of a joint arrangement, be published in portions by the several carriers. The route being one a charge for a service over it is a charge for a single service, all the terms of which must be fixed at one and the same time; that is, at the time the initial carrier enters into the engagement for the service. The rate is either a joint through rate made by arrangement by the parties to the through route, or it is a combination through rate consisting of 'the separately established rates, fares, and charges applied to the through transportation.' This sum, however, is a single rate for a single service, and a contract for through transportation is a contract for transportation at the through rate, whether jointly or separately established in force at the time the shipment is billed." This holding was approved by the Supreme Court: St. Louis, Iron Mountain & Pacific Ry. Co. *v.* I. C. C., 245 U. S. 136.

iting the routes, the rates which it contains apply at all junctions through which traffic is normally and customarily transported. But when a tariff specifies routing, the rates may not be applied except via the routes specified. The route has then become an integral part of the published rate.[1]

The shipper's right to control routing was established as a part of the 1910 Amendment to the Interstate Commerce Act. The Amendment of 1906 had merely given the Commission powers over the creation of new through routes and the publication of joint rates. This was important as an opening wedge.

§ 2. The power to enforce the establishment of through routes and publication of joint rates was not granted without qualification. No carrier can be required, without its consent, to embrace in a through route substantially less than its entire length of railroad, or that of any railroad operated under the same management, between the termini of the proposed route, unless so to do would make the route unreasonably long as compared with another practicable through route.[2] This clause has even been invoked, and invoked successfully, to justify cancellation of joint rates when their continuance would have required one of the carriers to utilize less than its entire available line. This was the principle set up by the Ogden Gateway Case.[3]

[1] This fact, and the rule that there can be in effect at one time only one lawfully published rate account for the rule that, where the rate and the route inserted by a shipper in a bill of lading do not coincide, it is the duty of the carrier's agent to ascertain whether the instructions as to rate or route shall govern. Mulkey Salt Co. *v.* Director General, 61 I. C. C. 669, citing Conference Ruling 474 C.

[2] For excellent cases illustrative of the principles involved, see I. & S. Docket No. 81, Rates from Chicopee, Mass., 23 I. C. C. 263; Merchants & Mfrs. Asso. *v.* C. R. R. of N. J., 30 I. C. C. 396; and West Coast Lumber Mfrs. Asso. *v.* Tacoma En. R. R. Co., 45 I. C. C. 227. In the latter case, at p. 229, the Commission stated the principle, upon which protection against a carrier being short-hauled is based, as follows:

"That the law upholds the carrier in retaining tonnage on its line where the transportation can be performed with reasonable dispatch and without undue discrimination is well settled . . . It is also settled that our authority under Section 15 of the Act to establish in the first instance, or to continue in force voluntarily established through routes and joint rates, is limited to the extent that we may not require a carrier, without its consent, to embrace in such through route substantially less than the entire length of its railroad between the termini of the through route, unless to do so would make such through route unreasonably long as compared with another practicable through route which could otherwise be established."

[3] 35 I. C. C. 131, 142. The Union Pacific had originally established rates jointly with the Denver & Rio Grande to Yellowstone Park and other

The right of a railroad to protection against being short-hauled is now, however, subject to the restriction—established in the interest of adequacy of service—that, in time of traffic congestion, or other public emergency, the Commission may temporarily establish any through routes which, in its opinion, are necessary or desirable in the public interest.[1]

§ 3. The refusal to participate in through routes and joint rates has usually been the result of the desire of a carrier to conserve the interests of the industries on its own line, and, in a sense, to protect those industries from "outside" competitors. It is the principle of the short hauling clause applied to the phase of the strategic struggle (market competition) always keenest when

points; but with the change of traffic policy it desired to eliminate the Denver & Rio Grande as an intermediate carrier to conserve the entire haul of passengers from Omaha to destinations in the Northwest to its own line. The majority of the Commission permitted the cancellation of the joint rates directing attention, however, to the fact that "throughout the record and on the argument the proposal of the respondent to withdraw the parity of rates over the route of the Denver & Rio Grande is referred to by the protestants as a closing of the latter route. A through route in the sense in which this term is generally used, embraces two or more lines of railroad moving traffic under conventional agreements at rates or fares made applicable for the through service between designated points. The fares for the through service may be joint fares or a combination of local fares. The withdrawal of joint fares does not therefore close a through route in the sense that passengers may no longer have a through service; nor may a carrier take any steps that will deprive passengers of the right to use its rails between any two points on the line at the regular established fare. . . . The question before us is merely the propriety of its proposal to withdraw the present joint through fares, leaving in effect for the through service the higher charges resulting from the application of the intermediate fares."

Cases illustrating the same principle are: Ocean and Rail Rates to Charlotte, N. C., 38 I. C. C. 405; Fruits and Vegetables from Texas Points, 40 I. C. C. 673; Grain from Missouri Points, 43 I. C. C. 737; West Coast Lbr. Mfrs. Asso. *v.* S. P. & S. Ry. Co., 45 I. C. C. 230; Routing on Coal from Western Maryland Mines, 66 I. C. C. 103.

[1] By Service Order No. 22, July 25, 1922, Division 5 of the Commission, recognizing the existence of "an emergency . . . upon the lines of all carriers by railroad in the United States subject to the Interstate Commerce Act which requires immediate action," and the inability of the carriers "to transport the traffic offered . . . so as to properly serve the public" ordered the railroads to forward traffic "by the routes most available to expedite its movement and prevent congestion, without regard to the routing thereof made by shippers or by carriers from which the traffic is received, or to the ownership of the cars." All rules, regulations, and practices of the carriers with respect to car service were suspended and superseded in so far only as conflicting with the directions made. Service Order No. 23 directed priority for human food, feed for live stock, live stock, perishable products, coal, coke, and fuel oil. The exercise of the emergency powers in 1922 is discussed in detail in 36th Annual Report I. C. C. (1922), pp. 9-16.

a low grade commodity is concerned. When the Santa Fé, serving a large consuming territory in Kansas, declined to establish through routes and joint rates with Colorado railroads serving the producing mines in the Walsenburg coal field in Colorado, on the ground that the Santa Fé itself served producers in the Rockvale coal district in the same state, complaint was made to the Commission. The Santa Fé asserted that the Rockvale mines could "supply every bit of the coal that is required" by consumers at points in Kansas, and claimed the right by maintaining the higher combination rates from the Walsenburg field, to protect its haul from the mines of the Rockvale producers. It asserted that with the establishment of joint rates from the Walsenburg mines, the Walsenburg operators would deplete the tonnage of coal moving from the Rockvale field, on which the Santa Fé secured the entire revenue. The Commission, however, required the establishment of through routes and joint rates:

> "The obligation of a common carrier to serve the public is a broad one and cannot be fulfilled in a way that is most advantageous to a carrier. It is the long haul that ordinarily yields the carrier its best profits, and traffic involving a long haul over its own rails is usually highly desirable from the carrier's point of view. A one line haul is equally desirable. The Santa Fé has good reason therefore to prefer to put the Rockvale coal into the Kansas markets. But coal shippers from points on the lines of its connections are clearly entitled to reach the same destinations under reasonable rates, even though it involves a two line haul."[1]

[1] Rates from the Walsenburg Coal Fields, 26 I. C. C. 85, 88. The same principle was discussed graphically by the Commission in an earlier case where the coal shippers in Illinois sought through routes and joint rates to destinations on the Chicago, Milwaukee & St. Paul in Wisconsin, the Commission denying the right of a carrier to favor shippers on its own line.

"If a railroad is a public highway, and Congress may lawfully authorize the Commission to establish through routes over it in connection with another railroad, when both are engaged in interstate transportation, and thus open the two roads to shippers as a through highway for the transportation of their merchandise, ought the Commission to refuse to open it to one merchant because another merchant farther along on the highway is able to supply the demand at distant points for the commodity in question? Ought the Commission to decline to enter an order to open such a through highway because one of the carriers, without endeavoring to show that its total revenues will be unduly diminished does show that its revenue on that particular traffic will be materially reduced? We find no such limitations in the clause in question. Nor are such limitations consistent with the duty that carriers owe to the shipping public. Being public highways, one merchant has as much right as another to move his goods over it. And it is no answer to his demand to say that the commodity in which he

It is then rather as a rate problem than as a service problem that the opening of through routes, on which joint rates are applicable, emerges for decision by the regulatory body. Even in the absence of a through route with a joint rate, the shipper has the right to demand that his traffic be transported via the same rails and through the same junction points that it would move if such a through route existed. But where there is no joint through rate in effect, the lawful rate applicable is the combination of the separately established rates of each of the several carriers. This differentiation is important when considered in the light of the shipper's right to specify the routing on his freight. Since joint rates are generally lower than the combination of the separately established rates of the participating carriers, shippers, wherever they have a considerable volume of tonnage, have been insistent upon the establishment of through routes and joint rates.

Much of the early antagonism of railroad managers to the establishment of through routes has disappeared. They have, in part, been influenced by the lessening of the margin between the volume of total traffic available in normal times and the physical capacity of the railroad plant. Except in periods of business depression, there is usually enough traffic to go around. This attitude, coupled with the aggressive stand of the Interstate Commerce Commission against the policy of carriers seeking to favor producers on their own rails, as against competitors on the

deals can be supplied, in sufficient quantity to meet all demands, by a merchant elsewhere on the highway. The right of one merchant to enter a distant market and compete with other merchants is a definite right which cannot be denied him on the ground that other merchants can supply all demands for that commodity. Nor is the fact that the revenues of the carrier may be reduced in the manner suggested by counsel a material consideration. It may be laid down as a general rule admitting of no qualification that a manufacturer or merchant who has traffic to move and is ready to pay a reasonable rate for the service has the right to have it moved and to have reasonable rates established for the movement, regardless of the fact that the revenues of the carrier may be reduced by reason of his competition with other shippers in the distant markets; and under all ordinary conditions he has the right also to have the benefit of through routes and reasonable joint rates to such distant markets if no 'reasonable or satisfactory' through routes already exist." Cardiff Coal Co. *v.* C. M. & St. P. Ry. Co., 13 I. C. C. 460, 466. The principle was upheld in Chamber of Commerce of Milwaukee *v.* C. R. I. & P. Ry. Co., 15 I. C. C. 460; Standard Lime & Stone Co. *v.* C. V. R. R. Co., 15 I. C. C. 620; Lumber Rates to Eastern Points, 27 I. C. C. 189; Hughes Creek Coal Co. *v.* K. & M. Ry. Co., 29 I. C. C. 671; Coal to South Dakota, 47 I. C. C. 750.

lines of other carriers has resulted in a general acquiescence by the carriers in the right of the public to require the establishment of through routes and joint rates, with the free interchange of traffic, wherever the probable volume of tonnage justifies a demand. Only when the carriers have showed the existence of established through routes and joint rates adequate to take care of the needs of the shippers, have they successfully resisted the establishment of new through routes. Even this success has depended also upon an ability to show that there has been no discrimination between competing connections. The principle of equal treatment applies to connections as well as to customers.[1] But where no joint rate can be enforced, either because of the short hauling provision, or because no showing of discrimination between connections can be made, the shipper can still have his traffic transported over a particular route by paying the combination of the separately established charges of the individual carriers. There is, under these circumstances, a through route but no joint rate.

§ 4. But because joint through rates are usually less than the combination of locals, and because their division has been left largely to private bargaining between the carriers, the railroads have been interested in controlling routing over connecting lines as a weapon in bargaining. For sound competitive reasons, therefore, they had opposed giving shippers the right to route. Especially important was it to railroads dependent upon connections for reaching important markets that they control tonnage to be delivered to one connection or another as they saw fit. This was their means of bargaining for an equitable division of revenue on through business and for a volume of return tonnage. In 1909 the Commission had commented on the law as it then stood:

> "The courts now hold, apparently, that carriers have this right [the right to route traffic] or at least that they may reserve it in their tariffs and may, therefore, as a practical matter, exercise it at will.

[1] C. M. & St. P. Ry. Co. *v.* Great Northern Ry. Co., 49 I. C. C. 302, 307. The most interesting cases illustrating the application of this principle have arisen in connection with rail and water movements, when the rail carrier has sought to limit the establishment of joint rates to a single company. Typical cases are Flour City S. S. Co. *v.* L. V. R. R., 24 I. C. C. 179; Decatur Nav. Co. *v.* L. & N. R. R. Co., 31 I. C. C. 281; Cumberland Trans. Co. *v.* C. N. O. & T. P. Ry. Co., 37 I. C. C. 463; Gulf Atlantic S. S. Co. *v.* A. C. L. R. R. Co., 46 I. C. C. 309.

> Ordinarily, it is immaterial to a shipper by what route his traffic moves, if it reaches its destination in due time, upon a proper rate and with the desired delivery. In such cases there is no apparent reason why the railroad ought not to be permitted to send that traffic by whatever route it may elect. There are, however, circumstances under which the privilege of designating the route by which the traffic shall move is a matter of convenience as well as value to the shipper, and under such circumstances his right ought to be protected. In our opinion, the Commission should have the authority, after investigation, to prescribe the conditions under which traffic may be routed by the shipper."[1]

The Commission's reference to the holdings of the courts doubtless had to do with the litigation in the Southern California Fruit Case.

In 1902 the Commission found that the Santa Fé and Southern Pacific were utilizing control over the through routing of oranges and lemons to divide the traffic on the basis of agreed percentages and ordered that the practice cease.[2] Prior to January 1, 1900, the shippers had routed their shipments, but, at that time, the initial carrier reserved to itself the control of routing of citrus fruit shipments. The change affected vitally the whole scheme of marketing. It was therefore certain that there would be a flare-up. The fruit trade had created machinery to keep careful check on market conditions over the country, and to report conditions so that, by a diversion of shipments in transit, a quick adjustment of supply to demand might be effected. It was frequently found advantageous to have a car billed to Chicago stopped at Kansas City, St. Louis, or some other point, or even sent on to New York or a point intermediate. The "postage stamp" rate adjustment fostered this practice. Sure knowledge of routing of the cars was essential for the carrying on of a system of marketing a perishable product, in which reconsignment and diversion were general. Granting permission to note a preference of points through which the shipper desired the freight to move would not mean a sure knowledge of the location of supplies, and by so much would complicate the task of accommodating supplies to local demand conditions, even if not making its accomplishment impossible. Even for non-perishables moving to a certain point of destination, when only the delivering line is of

[1] 23d Annual Report I. C. C. (1909), p. 7.
[2] Consolidated Forwarding Co. *v.* S. P. Co., 9 I. C. C. 182.

great importance, a knowledge of the actual participating lines makes more simple the task of tracing.

The Circuit Court rendered a judgment for the enforcement of the Commission's order, and required that the Southern Pacific desist from the practice of controlling the through routing. The Supreme Court, however, reversed this judgment, holding that there was nothing in the Act which prevented the carriers from agreeing upon a through routing of freight and insisting upon the right of routing as a condition of guaranteeing through rates.[1] It was undoubtedly this denial of the right of the shipper to route his own freight which led to the inclusion in the Interstate Commerce Act in 1910, of the clause which made it the positive duty of the carriers to observe shippers' written directions in respect to the movement of traffic. The new law changed significantly the scheme of inter-carrier relations, and carrier relations with the public. No longer was through routing, and interchange, primarily a matter of private negotiation for traffic managers. It was necessary for the railroads to send solicitors direct to the shippers, seeking routing over their lines.[2]

[1] The Circuit Court opinion is I. C. C. *v.* S. P. Co., 132 Fed. 829; the Supreme Court opinion is Southern Pacific Co. *v.* I. C. C., 200 U. S. 536.

[2] The traffic solicitor occupies an anomalous position in business life; he is a salesman, but he can make no inducements based upon the price considerations. He sells "service"—and this is another way of saying that he is the representative of the railroad seeking to determine the basis of any complaints, and to make the necessary personal contact for the railroad. This is an especially important work for the company which participates in the movement only as an intermediate or delivering carrier on outbound business, or as an intermediate or originating carrier on inbound business. It is a fairly certain rule that highly competitive business will fall to the route which is engaged in active solicitation, provided service is satisfactory, and it is the duty of the solicitor to know in what respects, if any, the service performance falls below the standard he has promised, tacitly or openly. In a very real sense he is an inspector, checking performances by securing the reactions of his road's customers to the treatment accorded them. The "off line" soliciting offices have the responsibility of "lining up" through business and keeping in touch with customers located at a distance from the railroad headquarters. The closing of the "off line" offices by the Railroad Administration, during the war, was one of the causes of dissatisfaction with service.

The solicitor is the representative of the Traffic Department: the "sales" department of the railroad. His job, whether he is "street man" in a big city, traveling freight agent, commercial agent or general freight agent, is to get business. The task of the passenger traffic representative is the same. But the actual movement of trains is done by the operating department, and complaints must move through channels to the head of the traffic department who is coördinate with the head of the operating department. The petty vexation due to strong departmental traditions presents a problem to

§ 5. The routing directions once given in writing are binding on shipper and carrier alike. The Commission holds that, whenever a shipper gives instructions to forward his goods via a particular route, the carrier is relieved of the duty of ascertaining whether the goods could be moved by another route at a lower rate. It is only when a shipper is damaged by a failure to observe his routing instructions that the Commission awards reparation, unless the rate via the route directed is found unreasonable. Where the failure is one to make proper delivery due to error of the shipper in marking his packages, however, the shipper must bear the resulting freight charges, even though the bill of lading bears the correct address.[1] Americans have so frequently given the same name to towns in different states that there is always possibility of error on this score: the Railway Guide lists fifteen Albanys, five Detroits, twelve Denvers, and no less than twenty-six Washingtons. There is a Boston in Georgia, a Philadelphia in Mississippi, a New York in Alabama, but only one Chicago. The marvel is that, in the face of this handicap, so few mistakes are made when the lack of system in the usual shipping room is taken into account.

By no means all of the traffic comes to the carrier with routing instructions. In the absence of specific through routing by the shipper, it is the carrier's duty to route the shipment via the cheapest reasonable route known to him of the class designated by the shipper (all rail, rail and water, etc.) via which there are lawful rates.[2] If the carrier's agent fails in this duty, and thus

most railroad presidents. It is not always easy to have the operating department deliver the service the traffic department sells, or to have traffic department sell only the grade of service the operating department can deliver. But the mere transportation of shipments is not all of the service the railroad sells; and by the little courtesies accorded his customers the freight solicitor makes friends: the relationship is very largely a personal one. He must arrange for tracing cars, for tracing claims which may become buried in a claim office, for arranging for new rates, and for a sympathetic presentation of shippers' needs at meetings of railroad officers. His job is to express by actions the interest of the railroad in its customers. He is not paid simply to give away cigars.

[1] Parlin & Orendorf Plow Co. *v.* U. S. Express Co., 26 I. C. C. 561.

[2] The Commission (Conference Ruling 91) has held that a much longer and a more indirect route is not a reasonable route. An interesting dispute involving substantially the same principle, but complicated by considerations of state and interstate rates, arose in connection with unrouted freight from Duluth to Minnesota points moving on the Northern Pacific, which had two routes available from Duluth to destination. One was wholly within the state of Minnesota and one extended through Wisconsin. On the latter

causes extra expense to the shipper over and above the lawful charges via another available route of the class designated by the shipper, the carrier, on admitting responsibility for the error, may adjust the overcharge so caused by refunding the difference between the lawful charges via the route over which shipment moved and what would have been the lawful charges via the cheaper available route which could have been lawfully used. This refund must in no case exceed the actual difference between the lawful charges via the different routes specified, and must in every instance be paid in full by the carrier whose agent caused the overcharge. It may not be shared in by or divided with any other carrier, corporation, firm or person. This ruling seeks to remove the temptation for a disguised payment of rebates. The authority for payment therefore does not extend or apply to instances in which soliciting or commercial agents of carriers induce shippers to route shipments over a particular line via which a higher rate obtains than is effective via some other line. Nor can it be used in any case or in any way to "meet" or "protect" a rate via another route or gateway when the adjusting carrier's tariffs, at the time the shipment moves, do not contain rates which are available and lawfully applicable. The authority may not be used as a means or device by which to evade tariff rates or to meet the rate of a competing line or route, nor

the interstate rate was higher than the intrastate rate applicable on the former, the intrastate rate having been reduced by the Minnesota authorities. The Northern Pacific during the period when the legality of the intrastate rates was in litigation, and while they were enjoined, under the injunction overruled in the Minnesota Rate Cases, carried the freight over the interstate route and assessed the higher rate applicable to that route. On a claim for damages for alleged failure to transport by the cheaper, or intrastate route, the Northern Pacific proved that it was its practice to move all outbound freight from Duluth over the interstate route and inbound freight over the intrastate route, because of the grades encountered and the relatively lower cost of such operation. The Supreme Court upheld it in this practice, saying:

"In the absence of shipping instructions it is ordinarily the duty of the carrier to ship by the cheaper route. But the duty is not an absolute one. The obligation of the carrier is to deal justly with the shipper, not to consider only his interests and to disregard wholly its own and those of the general public. If, all things considered, it would be unreasonable to ship by the cheaper route, the carrier is not compelled to do so. The duty is upon the carrier to select the cheaper route only 'if other conditions are reasonably equal.' Resort to the more expensive route may be justified. And the justification may rest either upon the peculiar circumstances of a particular case or upon a general practice. In the cases before us the justification is rested upon a general practice." Northern Pacific Railway Co. *v.* Solum, 247 U. S. 477, 482.

to relieve a shipper from responsibility for his own routing instructions.[1]

It must constantly be borne in mind that the law does not permit the use of any rate or fare except that contained in a lawful tariff that is applicable via the line, route, and gateway over and through which the shipment or passenger moves. The published rate is sacred. The carrier desiring to give its customers the benefit of the rate or fare applied via another line or gateway, lower than its own rate or fare, can lawfully do so only by incorporating that rate or fare in its own tariff and so giving the benefit to all alike. The law forbids extending such a rate or fare to one and withholding it from another.

The Transportation Act, 1920, while not affecting the relations of shippers and carriers relative to routing, introduced into the Interstate Commerce Act provisions designed to increase the earnings of particular lines. Any carrier deprived of its right to participate in the haul of property in conformity with routing instructions of the shipper, is entitled to recover the total amount of the rate or charge it would have received had it participated in the haul. The right of recovery is against the carrier at fault. Formerly the principal way of making up such diversions was by turning over an unrouted shipment with approximately the same revenue: a routine result of negotiation and correspondence.

§ 6. Even as to unrouted freight the right of the individual carrier has been curtailed, for "the Commission may, whenever the public interest and a fair distribution of the traffic require, direct the route which such traffic shall take after it arrives at the terminus of one carrier, or at a junction point with another carrier, and is to be there delivered to another carrier."[2] Under this provision the way is open for some of the weak lines, whose traffic is small, and revenue inadequate, to apply to the Commission for relief through an order requiring its connections to deliver to it a larger percentage of unrouted freight. The Kansas City, Mexico & Orient was the first of these carriers to seek this sort of relief.

[1] Conference Ruling 214; Lord & Bushnell Co. *v.* M. C. R. R. Co., 22 I. C. C. 463; Meeds Lbr. Co. *v.* A. & V. Ry. Co., 38 I. C. C. 679; Chattanooga Implement & Mfg. Co. *v.* L. & N. R. R. Co., 40 I. C. C. 146; National Wholesale Lbr. Dealers' Asso. *v.* Southern Ry., 48 I. C. C. 679, 680.

[2] Interstate Commerce Act, Sec. 15, Par. 10.

Yet it is not probable that effort on the part of the Commission to aid the weak lines in this manner is likely to prove particularly effective. Its adequacy depends upon two factors, neither of which the Commission can control: first, the relative amount of freight coming to the connection unrouted, and second, the relative financial condition of other carriers competing for the traffic. Any general effort by the Commission to direct the delivery of unrouted freight to specified connections could have only one result: the competing carriers, if they want additional business, will put their solicitors in the field to secure routings. The entire possibility of protection to the weak lines would be completely nullified by the shipper electing to route his traffic.

CHAPTER XVIII

TERMINALS AND TERMINAL FACILITIES

Section 1. Importance of Terminals, 272—Sec. 2. The Opening of Terminals to Competitors, 275—Sec. 3. Closed and Open Terminals, 276—Sec. 4. Emergency Control over Terminals, 279—Sec. 5. Extension of Terminals, 280.

§ 1. It was a consequence of the building of competitive railroads by private capital that some railroad companies secured more satisfactory terminal locations than others. Usually the pioneer secured the open places and river bottoms for yards. It was also inevitable that some railroad companies should have elected to develop their terminal properties more extensively than others. Managerial foresight was uneven; but early the importance of adequate terminal facilities had been generally recognized, and the railroad company, able to meet the expense, usually followed the policy of extending the terminal facilities so as to reach directly a maximum of industries. Carriers sometimes acted coöperatively. Not only were great sums expended in the development of extensive freight terminals, but the railroads deemed it desirable to modernize their passenger terminals from time to time. The passenger terminal problem, like the freight terminal problem, is most acute in congested centers. The common use of passenger terminals by suburban and through passengers has complicated the problem.

Railroad investment in terminal property is large. In a case decided by the Interstate Commerce Commission in 1909, the Great Northern Railway Company estimated the value of its right of way and terminals at $87,000,000, of which $55,000,000 was for terminals in ten cities. Of the Northern Pacific estimate of $107,000,000 as the value of its right of way and terminals, $73,000,000 was for terminals in eight cities.[1] In the New York Harbor Case of 1917 six railroads entering New York showed

[1] Spokane *v.* N. P. Ry. Co., 15 I. C. C. 376.

that the assessed value for taxation purposes of their terminals in New York aggregated $81,932,190, or only slightly less than the total value claimed by the Great Northern for its entire system in 1909.[1] Railroads entering Chicago offered evidence to the Commission in 1916 that, during the period from 1891 to 1914, inclusive, they had expended $73,320,293.11 for improving their terminal properties in Chicago by elevating the tracks, building subways, filling and paving streets. This figure did not include the cost of the tracks or the depots.[2]

Large as these figures are, the strategic advantages presumably outweigh the financial outlays involved. A railroad, which, with its own tracks, reaches the bulk of the industries receiving freight and offering it for shipment, is in a position to secure a large percentage of the total traffic offered, and received, for a maximum haul over its own lines. In many cases, however, railroad companies have not sought to provide extensive terminals in some of the cities which they undertake to serve, largely because of the preëmption by other carriers of the desired locations. The new-comer has sought to avoid expense. Thus the Soo Line has little terminal property in Chicago.[3] Where such a condition exists, the railroad without terminals is under the necessity of sacrificing tonnage or negotiating with other carriers for the use of their terminals.[4] Arrangements on the latter basis have been accomplished in some cases by trackage contracts whereby one carrier operates its trains over the tracks of another, or through the "absorption" of switching charges, the carrier without terminals meeting the competitive rate and paying the switching charge out of its share of the revenue. It thus "absorbs" the switching charge of the carrier handling the car after its arrival at the terminal.[5]

[1] 47 I. C. C. 643, 648.

[2] Business Men's League of St. Louis *v.* A. T. & S. F. Ry. Co., 44 I. C. C. 308, 335.

[3] Peoples Fuel & Supply Co. *v.* G. T. W. Ry. Co., 27 I. C. C. 24.

[4] "Burdensome" terminal contracts, under which the Pere Marquette secured entrance to terminal cities, including the "west bank" lake ports, are discussed, Pere Marquette–C. H. & D. Case, 44 I. C. C. 1, 11–12.

[5] Because competition enforces such absorption it is the usual rule that switching charges are absorbed only on competitive traffic.

In the Richmond Case it appeared that the Chesapeake & Ohio and Richmond, Fredericksburg & Potomac absorbed switching charges on traffic destined to or coming from all common points irrespective of whether or not the switching carrier reached the common point with its own rails,

It is not at all surprising that railroad companies strategically entrenched with adequate terminals should be zealous in their efforts to retain them for their own exclusive use. This policy has, in the past, given rise to many difficulties and disputes, and, where the public interest has intervened, regulation has sought to require the railroad with the large terminals to permit other railroads to utilize them upon reasonable terms. During the period of Federal control the Railroad Administration provided in many instances for the common use of terminals. The passenger trains of the Baltimore & Ohio used the Pennsylvania tracks in Chicago, and the Pennsylvania was required to permit the Baltimore & Ohio, Lehigh Valley, and other carriers, to enter New York City through its terminal facilities.

Prior to the period of Federal control, there was considerable controversy over the right of one railroad to use the terminal property of another. The Act to Regulate Commerce, as then effective, provided:

> "Every common carrier subject to the provisions of this Act shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers and property to and from their several lines and those connecting therewith, and shall not discriminate in their rates and charges between such connecting lines; but this shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business." [1]

Another section gave the Commission authority to require switch connections between carriers upon application of "any lateral branch line of railroad." [2] This authority the courts have construed strictly, defining the lateral branch lines which might apply for switch connections as railroads naturally tributary to trunk lines and dependent upon the latter for an outlet to the

while the southern carriers (the Atlantic Coast Line, Seaboard Air Line and Southern) absorbed the switching charges only on traffic to or from a community reached by the switching line. It was the southern carriers' practice which was condemned as illegal under Section 2. Richmond Chamber of Commerce *v.* S. A. L. Ry. Co., 44 I. C. C. 455, 467; upheld, Seaboard Air Line Ry. Co. *v.* U. S., 254 U. S. 57. This opinion was depended on in Nat'l Spring & Wire Co. *v.* Director General, 60 I. C. C. 564.

[1] This paragraph was contained in the original Act (Section 3) and was not touched by amendment until its entire revamping in 1920.

[2] Section 1.

markets of the country. "It is plain from the provisions of the act," said the Supreme Court, "the history of the amendments, and justice, that the object was not to give a roving commission to every road that might see fit to make a descent upon a main line, but primarily, at least, to provide for shippers seeking an outlet either by a private road or branch." [1] Before the enactment of this provision in 1906, by amendment to the Federal law, the Supreme Court had upheld the right of the states, acting through administrative bodies, to require railroads to make reasonable track connections.[2] The state laws, however, were strictly construed and railroads under such legislation had been compelled to connect only with roads not primarily competitive and only with strict regard to the relative situation of the railroads and the interests and communities to be served.

§ 2. The intricate problems arising in connection with terminals and terminal facilities have involved those cases where a carrier with extensive terminals has made voluntary arrangements with another carrier for the interchange of traffic upon mutually satisfactory terms while refusing to make a similar arrangement with other carriers seeking to reach the same terminal. Case after case has been presented to the Interstate Commerce Commission involving controversy of this kind.[3] In one of the earlier cases an electric line sought the establishment of through routes and joint rates to points on the terminals of steam carriers in the Chicago switching district, contending that these steam carriers owed to it a duty to interchange traffic and that the establishment of an interchange relationship would not constitute a giving to it of the use of the terminal properties of the steam railroad. The Commission, in dismissing the complaint, described among other things the complainant's argument, as follows:

> "It (the argument) proceeds apparently on the theory that the sole object of the provision above quoted was to afford a means by which new lines, with the aid of the Commission, may profitably force their way into shipping districts built up and already well and adequately served by older lines, and thus seize and divide with the latter such

[1] I. C. C. *v.* D. L. & W. R. R. Co., 216 U. S. 531; and see United States *v.* B. & O. S. W. Ry. Co., 226 U. S. 14.
[2] Wis., Minn. & Pac. R. R. Co. *v.* Jacobson, 179 U. S. 287.
[3] The more important cases are listed below, p. 277, note 1.

traffic as may be offered for movement. If that be the import of the clause in question, it is too well concealed to be readily discernible. With the development of the power of the Commission to regulate rates and to protect the public interests by readjusting them when in excess of reasonableness and fairness, the need of competing lines becomes less vital to shipping communities whose transportation facilities are already ample. And had the Congress intended thus to interfere in the competitive struggles of carriers for traffic it cannot be doubted that its policy would have been announced in more definite language. We regard it as clear that the purpose of the clause was to afford relief to shipping communities, and not to aid carriers to acquire strategic advantages in their contests with one another."[1]

When, however, it was found that a carrier with attractive terminals had voluntarily made arrangements for the interchange of traffic with one set of carriers, while refusing to make similar arrangements with another, the Commission inclined to the view that unjust discrimination was created which it was competent to order removed. The power to remove discrimination was held to dominate the clause of Section 3 restraining the Commission from requiring one carrier to give the use of its terminals to another. So, when the Pennsylvania Company at New Castle, Pennsylvania, made a traffic arrangement with the Baltimore & Ohio for the "reciprocal" switching of freight, thus enabling the Baltimore & Ohio to reach points on the Pennsylvania terminals, while excluding the Buffalo, Rochester & Pittsburgh, the Commission, on the complaint of the latter, found that unjust discrimination was created by the Pennsylvania's refusal. This discrimination was ordered removed.[2]

On the other hand, where the Frederick Railroad Company, a short line of railroad, sought to enter the terminals of the Baltimore & Ohio at Frederick, Maryland, the Commission dismissed the complaint because it appeared that the Baltimore & Ohio had not extended a similar right to any other railroads at that point. The Commission held that no discrimination existed and held that an adverse order would require the B. & O. to give the use of its tracks and terminals at that point to a competitor.[3]

§ 3. A series of cases, involving discriminatory practices in

[1] C. & M. Electric R. R. Co. *v.* I. C. R. R. Co., 13 I. C. C. 20, 25.

[2] B. R. & P. Ry. Co. *v.* Penn. Co., 29 I. C. C. 114, upheld Penn Co. *v.* U. S., 236 U. S. 351.

[3] Morris Iron Co. *v.* B. & O. R. R. Co., 26 I. C. C. 240.

opening terminals to some carriers and closing them to others, soon caused the Commission to distinguish between the "closed" and "open" terminals.[1] A carrier, which, though opening its terminal property to one or more connecting lines, denied the use of it to others through traffic and operating arrangements, was deemed to have waived the statutory immunity against opening its terminals to other carriers. Thereafter its terminals were designated as open terminals, and other carriers similarly situated to those with whom traffic and operating arrangements had been made were at liberty to make demands for the opportunity to enter the terminals upon the same terms and conditions. The distinction thus drawn was ultimately upheld by the Supreme Court:

> "If the carrier, however, does not rest behind that statutory shield (the old proviso clause in Section 3), but chooses voluntarily to throw the terminals open to many branches of traffic, it to that extent makes the yard public. Having made the yard a facility for many purposes and to many patrons, such railroad facility is within the provisions of Section 3 of the statute which prohibits the facility from being used in such a manner as to discriminate against patrons and commodities. The carrier can not say that the yard is a facility open for the switching of cotton and wheat and lumber, but cannot be used as a facility for the switching of coal. Whatever may have been the rights of the carriers in the first instance; whatever may be the case if the yard was put back under the protection of the proviso to Section 3, the appellants cannot open the yard for most switching purposes and then debar a particular shipper from a privilege granted the great mass of the public.

[1] St. L. S. & P. R. R. Co. *v.* P. & P. U. Ry Co., 26 I. C. C. 226; Waverly Oil Works Co. *v.* Penn. R. R. Co., 28 I. C. C. 621; Traffic Bureau of Nashville *v.* L. & N. R. R. Co., 28 I. C. C. 533; Switching at Galesburg, 31 I. C. C. 294; Nashville *v.* L. & N. R. R. Co., 33 I. C. C. 76; K. C. & M. Ry. Co. *v.* St. L. & S. F. R. R. Co., 46 I. C. C. 464; A. E. & C. R. R. Co. *v.* I. H. B. R. R. Co., 51 I. C. C. 331; C. L. S. & S. B. Ry. Co. *v.* Director General, 58 I. C. C. 647.

The complication at Nashville arose from the joint ownership of the terminals by the Louisville & Nashville and the Nashville, Chattanooga & St. Louis, and the desire of that system to keep the Tennessee Central out of the terminals. These roads exchanged no competitive traffic with the Central, but the L. & N. refused to switch competitive traffic except at local rates, and the N. C. & St. L. refused to switch at all. The Commission, finding that the affiliated lines switched for each other without regard to the competitive or non-competitive character of the business, held that the refusal to interchange both classes of traffic with the Central violated the discrimination rule. The Supreme Court held that the joint ownership of the terminals by the two carriers constituted them a single entity so that they performed no service for each other denied a third carrier. L. & N. R. R. Co. *v.* U. S., 242 U. S. 60.

In substance that would be to discriminate not only against the tendering railroad, but also against the commodity which is excluded from a service performed for others."[1]

Congress, in the Transportation Act, 1920, sought to eliminate the dependency of the jurisdiction of the Commission upon the distinction between "closed" and "open" terminals. By paragraph 4 of Section 3 of the Interstate Commerce Act as amended, the Commission is given authority to require one carrier to permit the use of its terminal facilities by another "if the Commission finds it to be in the public interest and to be practicable without substantially impairing the ability of a carrier owning or entitled to the enjoyment of terminal facilities to handle its own business." In the event that an order requiring such use of terminal facilities is made, the Commission is given authority to fix a compensation for the use of such facilities upon such terms as the Commission deems just and reasonable, the amount "to be ascertained on the principle controlling compensation in condemnation proceedings." In the event of dissatisfaction with such an award of compensation, the carrier whose terminal facilities have been affected, is given a right of action in the courts for damages. No cases have yet reached the courts under the new law, and it is perhaps doubtful whether the appeal to the courts will be much availed of. The measure of the compensation provided—the application of the law of damages controlling in condemnation proceedings—is such that a carrier will hesitate before demanding the use of valuable terminal properties of another.

A review of most of the cases, decided prior to the enactment of the new law, indicates that they were generally brought by small railroads which sought to avoid substantial expenditures for building up terminal property, choosing instead to make demands upon the larger and richer railroads for the opportunity of interchanging cars upon the basis of relatively small switching charges. If the compensation to which a carrier owning valuable terminal properties is entitled is to be measured, not by a relatively low switching charge, but by the value of the use of the property, to be determined conformable to damages which would be paid in the event of condemnation, recourse to this section

[1] L. & N. R. R. Co. *v.* U. S., 238 U. S. 1, 19.

will, more likely than not, prove inexpedient as a means of avoiding expense. Nor is it entirely clear that the attempt of Congress to require a road to surrender up its terminal property upon the basis of the compensation provided, will be upheld by the courts. Serious problems of constitutional law are involved, the result of which cannot now be anticipated. Much will depend upon the case which is presented and the nature of the order which the Commission may make.[1]

§ 4. In the Transportation Act, 1920, Congress also gave to the Interstate Commerce Commission emergency power in reference to the common use of terminals. The Commission, in the event of a shortage of equipment, congestion of traffic, or other emergency condition requiring immediate action, now has the power "to require such joint or common use of terminals, including main line track or tracks for a reasonable distance outside of such terminals, as, in its opinion, will best meet the emergency and serve the public interest." The terms are to be left to negotiations between the carriers, or, in the event of their disagreeing, may be fixed by the Commission after subsequent hearing, on a basis found just and reasonable.[2] It is quite conceivable that this emergency power may be upheld while the general grant of power as contained in Section 3 may be so limited as to be of relatively little concern.

From the standpoint of the development of railroad terminal property in the public interest, it is desirable that a railroad making a large investment should have some protection against

[1] In Hastings Commercial Club *v.* C. M. & St. P. Ry. Co., 69 I. C. C. 489, the Commission interpreted the new law as authorizing it to require one railroad to switch cars for another railroad, although it was conceded that this might not have been required under the old law, the terminal in question not being an "open terminal." No award of compensation "ascertained on the principle controlling compensation in condemnation proceedings" was made and no order was entered, but the Commission stated that it expected the carriers to agree between themselves upon the compensation. Three commissioners dissented on the ground that the majority had improperly construed the law in that (1) it does not authorize the Commission to require switching services to be performed by the carrier whose terminals are invaded, but that it is limited to the case where a foreign carrier seeks to operate physically over the terminals of another; and (2) that the statute is only designed to be operative where one carrier petitions the Commission to use the terminal of another. In this case a shipper sought to require the Burlington to use the terminals of the Milwaukee and to require the Milwaukee to consent thereto, both carriers being opposed to such use.

[2] Interstate Commerce Act, Sec. 1, Par. 15; Sub-par. C.

unreasonable demands by its competitors. Terminal congestion has been one of the great causes of car shortage whenever the volume of traffic has become temporarily abnormal. Some railroads have attempted to meet the situation by spending large sums in the development of more extensive and better equipped freight and passenger terminals, while others, whether from lack of funds or from shortsighted business policy, have failed to keep pace with the times, relying rather upon the expenditures of their rivals than upon the assumption of financial burdens which might not be immediately remunerative. Certainly, the carrier which has provided itself with adequate terminals at considerable expense, should not be compelled to sacrifice their use to other carriers unless the compensation for this use takes into account not only the present cost of service but also provides payment for the risk and financial sacrifice of the carrier which made the investment. Otherwise initiative will be stifled, for no carrier will find it advantageous to make large investments for a competitor to use at a low unit cost.

§ 5. One more matter needs discussion in connection with the terminals and terminal facilities of the carriers. The Interstate Commerce Act excludes from the jurisdiction of the Interstate Commerce Commission "the construction or abandonment of spur, industrial, team, switching, or side tracks, located, or to be located, wholly within one state."[1] Many of the states have authorized their railroad commissions to exercise the jurisdiction in respect to the construction of spur and industrial tracks. Where a railroad company has voluntarily undertaken to serve a particular community it is held to owe a duty to serve the community adequately and the legislature, directly, or through the medium of a regulatory commission, may enforce that obligation. While common carriers may not be compelled to make unreasonable outlays,[2] nor to construct tracks of a purely private nature,[3] it is competent for the state to compel carriers to extend their transportation facilities, within the scope of their obligation voluntarily undertaken, so as to meet the demands of trade. Requiring the construction of side tracks has been recognized as

[1] Interstate Commerce Act, Sec. 1, Par. 22.
[2] Mo. Pac. Ry. Co. *v.* Neb., 217 U. S. 196.
[3] Hairston *v.* D. & W. Ry. Co., 208 U. S. 598.

an essential part of meeting that general obligation.[1] Some of the state courts have even held that the states have the power to compel a railroad to establish and maintain stations at all proper points.[2] The reconstruction of stations with modern equipment and facilities has often been required by state commissions and this exercise of power has been upheld by the courts.[3]

[1] Union Lime Co. *v.* C. & N. W. Ry. Co., 233 U. S. 211.

[2] C. & A. R. R. Co. *v.* The People, 152 Ill. 230; C. R. I. & P. Ry. Co. *v.* Neb. Ry. Com., 85 Neb. 818; Southern Ry. Co. *v.* Miss., 95 Miss. 657.

[3] State *v.* Northern Pacific Ry. Co., 90 Minn. 277, 96 N. W. 81; Cunningham *v.* R. R. Comm'r's, 158 Mass. 104, 32 N. E. 959.

CHAPTER XIX

SPECIAL PRIVILEGES AND FACILITIES

§ 1. In addition to the physical movement of property from point of origin to destination, there are the many ancillary services and facilities in connection with that transportation service which the public has asserted the right to regulate. Oftentimes the regulation is rather a rate matter than a service regulation, although the presentation includes two phases of a single transaction. Section 6 of the Interstate Commerce Act, which requires the carriers to publish their rates, insists that the schedules shall state "all privileges or facilities granted or allowed and any rules or regulations which shall in any wise change, affect, or determine any part" of the aggregate of the published rates, or "the value of the service rendered to the passenger, shipper, or consignee." By no other expedient could the integrity of the published rate be assured: for no more effective means of rebating or discriminating between shippers had been devised than extension of privileges and facilities to favored shippers not accorded to the general public. Both the rate and the character of the service must be published, if that service extends beyond mere transportation.[1]

[1] Recognition of the possibility of discrimination caused the Supreme Court unqualifiedly to disapprove the unpublished agreement of the Chicago & Alton to expedite a shipment of horses for a single shipper. This case established the rule of law on a firm foundation, for the contract was one entered into in good faith, being an agreement to get a shipment of fancy bred horses to New York in time for a public exhibition. The fact that the tariff provided for no expedited service for a public exhibition, was held, in the absence of negligence by the Alton, to preclude recovery based on the failure to make connection with an eastern railroad. The shipper sued on the contract and the railroad pleaded that the contract was not valid, since it promised a special service not contained in the published tariff. In this contention the carrier was upheld: "To guarantee a particular connection and transportation by a particular train, was to give an advantage

Certain special services are an essential part of a transportation service furnished for particular classes of traffic, and it is the duty of a common carrier accepting any goods for transportation to provide the necessary facilities for their carriage in a proper manner. The Interstate Commerce Act defines "transportation" to include "ventilation," "refrigeration," and "icing," and charges for such services must be separately stated in the tariffs, exactly as are other special charges incident to transportation. The railroads comply with this obligation to protect perishable goods in transit by furnishing refrigerator cars, either through personal ownership or by lease. In order that they may be assured of use for their facilities, it has been recognized that whatever transportation facility or service the law requires carriers to furnish they have a right to supply.[1] Otherwise there might be a useless and uneconomical duplication. The railroad can insist upon using its own cars and cannot be compelled to accept those tendered by the shipper. It can also assert the right to furnish all the ice needed for refrigeration in transit.[2] The right of the carrier itself to perform the full duties of transportation is clear. Otherwise the railroad would be demoralized, by reason of an irregular demand for such services, and be forced to depend upon haphazard calls under which refrigeration could be demanded by all shippers at one time and by only a few at another time. If, however, the carrier elects to use the facilities of a shipper, or to have a shipper himself perform service in connection with the transportation obligation that the carrier has

or preference not open to all, and not provided for in the published tariffs." One of the broad purposes of the Commerce Act—the insurance of equal treatment—would be defeated, if sanction were given to special contracts for special service. Chicago & Alton R. R. Co. *v.* Kirby, 225 U. S. 155.

The holding in New York, Phila. & Norfolk R. R. Co. *v.* Peninsula Produce Exch., 240 U. S. 34, is not inconsistent with this holding. In the latter case, the provision of the Bill of Lading (being one of the conditions filed with the tariffs under the Interstate Commerce Act) requiring transportation "with reasonable dispatch," had been depended upon in a suit for damages. The Supreme Court held that an argument based on the stipulation that the carrier is not bound to transport "by any particular train or vessel, or in time for any particular market" was "not addressed to the issue." The stipulation invoked did not limit the duty of the carrier to transport with reasonable dispatch—and it was on this ground that the jury had awarded damages.

[1] Wyandotte Terminal R. R. Co., 62 I. C. C. 1, 6; U. S. Cast Iron Pipe & Foundry Co. *v.* Director General, 62 I. C. C. 339, 343.

[2] A. T. & S. F. Ry. Co. *v.* U. S., 232 U. S. 199.

assumed, the carrier may pay the shipper therefor. In order to avoid having such a practice used as a cloak for rebating, the Interstate Commerce Commission is given power to fix the maximum payment to be made to a shipper in these circumstances.[1]

§ 2. The elevation of grain in transit is another special service under the control of the Commission. In order to expedite the return of cars to their owning lines and to prevent their continued absence on through trips to the east, it became desirable to shift the grain to other cars at certain of the eastern termini of the large grain carrying roads of the west. This change could be economically made by passing the grain through an elevator, where it was also weighed and graded, the former step in particular being a part of the transportation service. To accomplish these purposes and, at the same time, to save the financial burden of building expensive elevators the custom grew up among the railroads of contracting with the owners of elevators to perform these elevator services in return for specified payments. In some instances contracts were made with large shippers of grain to provide the elevators themselves and to receive compensation from the railroad. The grain which passed through these elevators was either the property of owners of the elevators or else was handled by them as agents of the railroad interested in performing the contract of transportation. The railroads, instead of being paid for the service thus rendered, in fact contracted with others to perform the function. Apart from the mere transfer of grain from car to car and the weighing of it, the owners during the process of elevation were able to perform other operations not connected with transportation, such as cleaning, sorting, mixing and clipping. The opportunity to perform these "commercial" processes, constituted a privilege valuable to the grain dealers, and one for which they did not pay. Nevertheless the Supreme Court, in consideration of the fact that the carrier secured certain advantages in connection with the elevation of grain and its transfer from car to car, and that it could hire the instrumentality instead of owning it, approved an allowance by the carrier to the elevator equal to the costs of the service.[2] The Interstate Commerce Commission to prevent disguised rebating has sought

[1] Interstate Commerce Act, Sec. 15, Par. 13.
[2] I. C. C. *v.* Diffenbaugh, 222 U. S. 42.

to draw a distinction between the processes included within the general term of elevation, dividing them into those which are incident to the transportation service and those primarily of a commercial character. The distinction was stated as follows:

> "There are two kinds of elevation, one of which may be termed transportation elevation, consisting of the passing of the grain through an elevator for the purpose of transferring it from car to car and obtaining its weight, and commercial elevation, which involves various processes in the treatment of the grain itself like cleaning, mixing, clipping, drying, etc. The first sort of elevation is an incident to the transportation of the grain, the second, to the merchandising of the grain."[1]

In so far as elevation partakes of the nature of transportation service, then, the Commission has held that its furnishing is a duty the carrier owes. It must pay the elevator company for performing this service if it elects to act through such an instrumentality. The Commission's ruling in this regard was stated as follows:

> "The meaning of the first section (Interstate Commerce Act) is clearly to impose upon the carrier the duty of refrigeration, storing, elevating, transferring, in so far as those matters are properly incidental to the transportation. It was the intent of Congress to compel the carrier to perform, to the full, its transportation service in all its essentials, and to put that entire service within the jurisdiction of this Commission to the end that unreasonable and discriminating charges might be prohibited. We are of the opinion that the elevation referred to by the Supreme Court is not commercial elevation but the transportation elevation which is a necessary incident to the handling of grain from the field to the consumer."[2]

Consistent with these rulings, the Commission permitted the carriers to withdraw the allowance even over the protest of the shippers, where it appeared that the carriers had by tariff provision made allowances for elevation which was unnecessary to transportation, but which was clearly for the benefit of the shippers, and performed primarily for the purpose of enabling the processing of the grain, and not for its transfer and weighing.[3] The Commission found that the elevation required by Section 1 of the Act, and for which, if rendered by an elevator company,

[1] In re Elevation Allowances, 24 I. C. C. 197, 199.
[2] Traffic Bureau, Merchants' Exchange of St. Louis *v.* C. B. & Q. R. R. Co., 22 I. C. C. 496, 502.
[3] Grain Elevation Allowances at Kansas City, 34 I. C. C. 442.

the carriers could make an allowance under Section 15 of the Act, was only such elevation as was reasonably necessary for the transportation movement. Carriers are not required by the Act to furnish elevation desired by the shipper for commercial reasons. The carrier could permit a stoppage in transit for such elevation on the basis of the through rate, but it could not be compelled to make allowance to the shipper or to elevator companies for the performance of the elevation service.[1]

§ 3. Another special service of transportation which has given rise to some controversy concerns the loading and unloading of freight. It has been the general practice of carriers in the United States to load and unload less than carload freight with their own employees and at their own expense. As to carload freight the rule and custom in this country is for the loading and unloading service to be performed by the shipper. All that is required of the carrier of carload freight is that it shall place the cars where they may be safely and conveniently loaded or unloaded. Property transported in carload lots may be delivered by placing the cars upon a siding or other convenient place for unloading and the surrender by the railroad company of dominion over the shipment to the consignee.[2]

In some instances, and under special conditions, the carriers have held themselves out, by their tariffs, as offering to perform the loading and unloading service in respect to carload freight. In such instances, the Commission has permitted them to make an extra charge for this service on the ground that it is not an accessorial part of the transportation which Section 1 of the Interstate Commerce Act requires them to perform.[3] There is some question under the law as it has now been interpreted, whether a carrier may voluntarily assume the costs of loading and unloading carload freight without subjecting itself to a charge of unjust discrimination.[4]

[1] Traffic Bureau, Merchants' Exchange *v.* C. B. & Q. R. R. Co., 22 I. C. C. 496, 502.

[2] Hutchinson on Carriers, Third Edition, Section 711; see also Schumacher *v.* C. & N. W. Ry. Co., 207 Ill. 199, 206.

[3] Schultz-Hansen Co. *v.* S. P. Co., 18 I. C. C. 234, 239; Utica Traffic Bureau *v.* N. Y. C. & H. R. R. R. Co., 18 I. C. C. 271; Dunnage Allowances, 30 I. C. C. 538, 543.

[4] St. Louis (Cupples Station) Terminal Regulations, 40 I. C. C. 425. For a case where the carriers had offered to perform the service, see I. C. C. *v.* Waste Merchants Asso., 43 Sup. Ct. Rep. 6.

The only exception to the general rule in respect to the duty of the shipper to load and unload his carload freight exists in respect to the transportation of live stock, as to which, in certain instances, the duty is specifically imposed upon the carrier by Congressional legislation. The heavy movement of live stock is to and from public stock yards located in important cities of the country. Generally these stock yards are not owned by the railroad companies. It had long been the practice of the railroads in the United States to make allowances to the several public stock yard companies for the loading and unloading of live stock transported by railroad, the allowance being generally made as a specified amount per car. Following a controversy as to the amount of this allowance between the railroads entering Chicago and the Union Stock Yards Company which operated the public stock yards at that point, the Interstate Commerce Commission held that the carriers were within their rights in refusing to pay any increased allowance. It was held to be the duty of the shipper and not of the carrier to load and unload carload traffic, including live stock.[1] Immediately thereafter the representatives of the live stock association became active promoters of legislation which would modify the rule thus laid down. The result was that, as a part of the Transportation Act, 1920, Congress provided that transportation of ordinary live stock by railroad, when received at or destined to public stock yards, should include "all necessary service of unloading and reloading en route, delivery at public stock yards of inbound shipments into suitable pens and receipt and loading at such yards of outbound shipments without extra charge therefor to the shipper, consignee or owner."[2] This meant requiring the carriers to pay to the public stock yard companies their total charges for loading and unloading live stock moving in interstate commerce by railroad.[3] The Commission asserts the right to regulate the charge which the public stock yards may lawfully receive for this service, but after the charge is once established, the duty of the carrier is to absorb it in full and not to bill any part against the shipper.[4] The differentiation in the Transpor-

[1] Live Stock Loading and Unloading Charges, 52 I. C. C. 209.
[2] Interstate Commerce Act, Sec. 15, par. 5.
[3] Live Stock Loading and Unloading Charges, 58 I. C. C. 164.
[4] Live Stock Loading and Unloading Charges, 61 I. C. C. 223.

tation Act between shipments moving to and from public stock yards and those moving between other points has been preserved in the decision of the Commission. As to the shipment of live stock, the point of origin or destination of which is not a public stock yard, the shipper is still required to bear the burden of loading or unloading.[1]

As incident to the transportation of freight, carriers have frequently undertaken to perform certain services which could not be required, but which, once undertaken, they have been obligated to perform at a reasonable charge and without unjust discrimination. The carriers reaching Baltimore in 1867 inaugurated what was known as the store-door delivery, at their own expense arranging for the delivery of freight to the place of business of the consignee. A similar practice was inaugurated in Washington in 1883, and, when the carriers in 1913 sought to withdraw it, the Interstate Commerce Commission suspended their tariffs and inaugurated an investigation. The Commission's decision stated that the carriers could not withdraw the service at Washington without being guilty of unjust discrimination so long as it was continued at Baltimore.[2] The result was the withdrawal of the store-door delivery service at both Baltimore and Washington. This led to the filing of a complaint on behalf of the Baltimore interests seeking the restoration of the store-door service there, but the Commission held that the carriers were under no duty to extend such a service as a part of the transportation of freight.[3] Similar complaint by Washington interests was likewise dismissed.[4]

In other instances, the carriers themselves have undertaken to perform voluntary services which could not be required of them in connection with the transportation of property, as in dumping coal into boats from the piers in the harbors of Norfolk and Newport News. For this service the Commission held that they were entitled to maintain and collect a reasonable charge from the shippers.[5] The maintenance of separate spotting charges for delivering cars to industries on private or spur tracks has also

[1] Omaha Packing Co. *v.* A. T. & S. F. Ry. Co., 66 I. C. C. 44.
[2] Washington, D. C., Store Door Delivery, 27 I. C. C. 347.
[3] Merchants & Mfrs. Asso. *v.* B. & O. R. R. Co., 30 I. C. C. 388.
[4] Judd & Detweiler *v.* B. & O. R. R. Co., 30 I. C. C., 455.
[5] New England Coal & Coke Co. *v.* N. & W. Ry. Co., 33 I. C. C. 276.

been upheld.[1] Any special service or facility offered by the carrier must, however, be performed without unjust discrimination and be open to all shippers upon equal terms.[2] Not only may the Commission require the removal of such unjust discrimination as it finds to exist, but it may pass upon the reasonableness of the charge which is published for performing a voluntary service. Where carriers reaching certain eastern seaboard ports undertook the service of "trimming" or levelling coal in holds of ships, the Commission entertained a complaint as to the reasonableness of the charge which was published for the service. The opinion held that, whether or not the carriers could be compelled to perform the service, so long as they undertook to perform it, they were under a duty to assess no more than a reasonable charge. On the question of reasonableness the Commission asserted its possession of the right to review.[3]

§ 4. The various forms of transit privileges have sometimes been described as falling within the class of special privileges and facilities. Some of the problems are, however, concerned rather with rates than with service, and have been discussed on that basis. Transit privileges are primarily rights to withdraw goods from transportation temporarily and later to put them back into the flow of transportation, subject to the condition that the total charge shall be the through rate from point of origin to point of ultimate destination. Usually but not always there is added a specific charge for the "stop over" privilege extended. In other words, a transit privilege is nothing more or less than a published arrangement whereby the shipper escapes from paying the combination of local rates to and from the transit point and is enabled to move his freight on something less than this combination. It is a peculiar phase of the problem of equalization, granted only in conformity with the provisions of the published tariffs of the carriers. All of the conditions of the tariffs must be complied with, and these conditions generally have to do with the time during which shipments may be temporarily withdrawn from transportation, together with rules and regulations for registration with the carrier, and notification to its proper officers so that

[1] R. R. Com. of Fla. *v.* Florida East Coast Ry. Co., 42 I. C. C. 616.
[2] St. Paul Board of Trade *v.* M. St. P. & S. M. Ry. Co., 19 I. C. C. 285.
[3] New England Coal & Coke Co. *v.* N. & W. Ry. Co., 22 I. C. C. 398.

the privilege may be properly "policed." Transit privileges are granted for a variety of purposes. In some instances they are granted to such an extent that the property may actually be manufactured during the course of its transportation. Thus the transit privileges on grain frequently permit its manufacture into flour and the so-called fabrication privileges permit certain manufactures of iron and steel articles to be subjected to a process in transit. Cotton is compressed in transit and various products such as glucose, grain screenings and the like, are mixed together into live stock feeds. Sometimes the privilege is merely one of stoppage and storage.[1] But the carrier, in the case of the usual transit privilege, does not itself perform any service in respect to the freight other than to permit of its unloading and reloading at the intermediate transit point.

§ 5. Reconsignment or diversion is another privilege important to the users of the railroad, and playing a large part in the marketing organization, especially of the commodities produced at a distance from the dense consuming area and passing through railroad "gateways" from which traffic can be moved in several directions without penalty.[2] The two words have been used interchangeably to signify an alteration in the destination of a shipment either before or after it reaches its originally billed destination.[3] In practice a great majority of the reconsignments are expected at the principal intermediate junctions or "hold" points, and at such points the carriers have established "hold" yards,

[1] Storage in Transit Rules at Minnesota Transfer, 68 I. C. C. 572.

[2] Non-existence of an "out-of-line" haul is a condition precedent to the right of a shipper to demand reconsignment at the through rate from origin to final destination. Red Cedar Shingle Mfrs. Asso. *v.* C. B. & Q. R. R. Co., 41 I. C. C. 422; Northern Brokerage Co. *v.* Director General, 60 I. C. C. 182.

[3] Whatever distinction may once have existed between the terms, reconsignment or diversion, has broken down in practice. Most railroads do not attempt such a distinction. Strictly speaking the change of the destination *en route* is a diversion, while reconsignment is effected after a shipment has reached its original billed destination.

In Southern Railway Company *v.* St. Louis Hay & Grain Co., 214 U. S. 297, the Supreme Court enjoined an order of the Interstate Commerce Commission, remitting the proceeding to the Commission for further investigation. The Commission had limited the right of the carrier to assess a reconsignment charge upon the basis of actual cost of service. The Supreme Court held that this was error, and that regardless of whether or not the carrier was under any obligation to extend the privilege to shipper, if it did so extend it, it was entitled to some compensation in addition to the actual cost involved in taking loaded cars in transit

and created clerical forces to perform the special work involved in furnishing this particular service. The purpose is to divert the shipment to the most promising market, and in some instances title passes while the car is moving from producing area to consuming market. In general this means a movement into the East and North from the West and South, though coal moves to the West. The marketing functions performed are those of assisting in the equalization of supplies, preventing alternate conditions of glut and scarcity, a most important function where perishables are being sold, or of permitting movement of commodities according to a particular need without storage and rehandling.[1] The reconsignment privilege is, therefore, most important in the fruit and vegetable trade, in the cotton trade, in the lumber trade, and the coal trade, though it is by no means limited to these. The Eastern hay, grain and straw trade is largely organized to take advantage of the reconsignment privilege;[2] likewise the crude oil trade.[3] So important is the place occupied by reconsignment in many lines of business that the Commission has very generally insisted upon its performance —at the same time upholding the propriety of a charge for the service, in addition to the freight rate, based upon cost, including a reasonable profit.[4]

to the shippers' warehouses at an intermediate point for unloading, inspection, and reloading, and taking away the reloaded car. At page 301 the Court said:

> "If the stopping for inspection and reloading is of some benefit to the shipper and involves some service by and expense to the railway company, we do not think that the latter is limited to the actual cost of that privilege. It is justified in receiving some compensation in addition thereto. A carrier may be under no obligations to furnish sleeping or other accommodations to its passengers, but if it does so, it is not limited in its charges to the mere cost, but may rightfully make a reasonable profit out of that which it does furnish. Especially is this true, when, as here, the privilege is in no sense a part of the transportation, but outside thereof.
>
> "Whether the conclusion of the Commission that the carrier is under no obligation to permit the interruption of the transit is right, and whether it is, or is not, under such obligation, it is entitled to receive some compensation beyond the mere cost for that which it does."

[1] Detroit Traffic Asso. *v.* L. S. & M. S. Ry. Co., 21 I. C. C. 257, 259.

[2] The practices, and the "hold" points, in this trade are discussed, Com'l Exchange of Philadelphia *v.* N. Y. C. & H. R. R. R. Co., 38 I. C. C. 551, 552; other hold points are given in the Reconsignment Case, 47 I. C. C. 590, 608, 609, 611, 621.

[3] Reconsignment and Diversion Rules, 58 I. C. C. 568, 572.

[4] Beekman Lbr. Co. *v.* K. C. S. Ry. Co., 17 I. C. C. 86; Detroit Reconsigning Case, 25 I. C. C. 392; Becker *v.* P. M. R. R. Co., 28 I. C. C. 645; Doran *v.* N. C. & St. L. Ry. Co., 33 I. C. C. 523. The Reconsign-

§ 6. It is possible that, with the development of new forms of commercial intercourse, the carriers, either voluntarily, or under the coercion of public authority, will assume new obligations in respect to transportation service. The railroads must expect to adjust themselves and their practices to new conditions arising, as they have done in the past. Who, in the beginning of railroad transportation, would have thought of the refrigerator and tank cars now so commonly used in the transportation of important commodities? These have revolutionized important industries, yet they themselves are a product of evolution. So are the other special forms of equipment: the stock cars, the live poultry cars, and even the specially designed automobile cars, a product of a more recent need for service. Surely no fixed rule can now be laid down generalizing on the obligation of the carriers in respect to the furnishing of special facilities and privileges in connection with the development of new forms of commodities and new kinds of transportation demands. Doubtless the energy of railroad managers, extended to secure competitive traffic, will lead to the improvement of facilities and their extension. But the rules fundamentally important to the public will not be new: whenever a carrier undertakes to furnish some special kind of service, it can do so only through the medium of its published tariff; it must furnish that service at a reasonable charge and without unjust discrimination as between shippers. The rules governing rate regulation, which now govern service regulation as well, will continue to control.

ment Case of 1917 considered in detail both the character and cost of the service. 47 I. C. C. 590; and see Reconsignment and Diversion Rules, 58 I. C. C. 568.

CHAPTER XX

NEW CONSTRUCTION AND ABANDONMENTS

§ 1. Of all questions of regulation having to do with the adequacy of common carrier service none is more important than that which relates to new railroad construction and the abandonment of property operated. Under the system of private ownership and operation of railroads, private capital has been encouraged to make investments in railroad property by hope of handsome profits, and, in some instances, by direct government aid through the medium of land grants, or a lending of government credit. Localities benefited have paid a bonus or have bonded themselves.[1] With the development of restrictive legislation, and the curtailment of opportunity for financial gain through stock promotion schemes, there has been less incentive for the building of new lines of railroads than under the former *laissez faire* policy. There has also been less need. The slowing down of new railroad building has been due, in part to the overbuilding in the beginning and during the early starving time, in part to the adoption of a policy of hesitation by private capital while the traffic was catching up with the physical capacity of the plant. Probably a combination of these causes, in addition to the incidence of the wartime price revolution, account for the depreciation of railroad credit and the consequent lack of attractiveness of investment in new properties. But, in any event, if the system of private ownership and operation is to be made a

[1] In considering the issue of a certificate of public convenience and necessity for the proposed Idaho Central Railroad, the Commission said:

"There is to be no promotion stock, but certain of the promoters are to receive, as a bonus for underwriting the securities, the sum of $500,000 which has been subscribed by citizens of the territory to be served, payable when the completed line shall be ready for operation." Public Convenience Certificate to Idaho Central R. R., 70 I. C. C. 265.

permanent success, either the public must be led to an understanding of the necessity to foster the voluntary construction of new lines of railroad to keep up with the public needs, or it must assert a right to compel such building. In the latter event, under our constitutional system, the public will have to undertake a new obligation to private capital thus invested—the obligation to insure the earning of a fair rate of return.

§ 2. For years the states have successfully asserted the right to prevent new railroad construction in the absence of a certificate of public convenience and necessity.[1] The right of the state to prevent private capital from engaging in the construction of new lines was primarily exerted to protect those who had invested in railroads, necessary to the public interest, from being "held up" by promoters who had no thought other than to be "bought off." Under the laws of most states, no corporation can engage in transportation by railroad without first securing a franchise. It must comply with the laws of the state applicable to public service corporations seeking to do a common carrier business. As a condition precedent to the granting of such a franchise, the state may require that the corporation shall make proof of the public convenience and necessity of the undertaking.

Until the passage of the Transportation Act, 1920, Congress had not legislated on this matter. Then, in Paragraph 18 of Section 1, of the amended Interstate Commerce Act, Congress undertook to restrict the building of new lines of railroad. The governing theory was that such restriction would tend to stabilize existing conditions and to prevent the construction of unnecessary lines of railroad which, "without any reasonable hope of profitable operation, would become a burden upon the public."[2] Already there were in existence some lines of railroad, which, it was urged, should never have been built, because unwisely located, and unnecessary in the interest of the general public, their support representing a burden on the public for their continued maintenance, hardly compensated by corresponding benefits afforded. Disposition of these "weak lines" presented one of the

[1] Petition of the Milford & Manchester R. R., 68 N. H. 570; People *ex rel* Steward *v.* Board of R. R. Com., 160 N. Y. 202; People *ex rel* N. Y. C. & H. R. R. R. Co. *v.* P. S. Com. of N. Y. (2d District), 227 N. Y. 248.

[2] House Report No. 456, 66 Cong., 1st Sess.

great problems in creating a scheme which should operate to rehabilitate railroad credit. The rule of rate making did not furnish a solution of the problem, because Congress had merely directed the Interstate Commerce Commission to initiate rates so as to provide a net return on the aggregate value of the property of the carriers in groups, upon such percentage as the Commission might deem to constitute a fair return for all such property.

The weak lines, under no conceivable scheme of competitive rate making, could expect to earn the standard rate of return upon their individual properties without the imposition of a rate level that would be generally unreasonable to the public. To recognize the existence of the "weak lines" and the essential nature of the commitment made by the community in permitting original investment in these properties was, however, quite another thing from permitting further unwise investments of similar character. Quite logically, Congress enacted the prohibition against the construction of more lines of railroad until a national agency should have approved of their public convenience and necessity. The law is now clear: no carrier by railroad may construct a new line, or acquire or operate any line of railroad or any extension thereof, or engage in interstate transportation, as defined by the Interstate Commerce Act, without first obtaining from the Commission a certificate that the present or future convenience and necessity requires, or will require, the construction or the operation of the line.[1] Since all railroads doing business in the United States must engage in interstate commerce, to some degree at least, if their operations are to be successful, it is highly improbable that any capital can be attracted to an enterprise unless such a certificate of convenience and necessity has been secured.[2] While Congress, in this provision, has not directly

[1] Interstate Commerce Act, Sec. 1, Par. 8. Where the line was in operation prior to the effective date of the Transportation Act, or where construction of extensions had commenced before that date, the Commission ruled that its certificate was not needed. Public Convenience Application of Grand Trunk Wn. Ry. Co., 67 I. C. C. 780; Public Convenience Application of Texas, Oklahoma & Eastern R. R. Co., 67 I. C. C. 484; Public Convenience Application of Uvalde & Northern Ry. Co., 67 I. C. C. 204, 554.

[2] Purely plant facilities, which later may be utilized in common carrier service, will of course be built without the Commission's permission, but

stated that no line of railroad may be built to engage in purely intrastate commerce without the Commission's consent, yet as a practical matter the Congressional prohibition dominates the entire field. Hereafter, the Interstate Commerce Commission will have the final voice in determining whether or not private capital shall engage in a particular common carrier service. Requirement of certificates of convenience and necessity is not limited to new projects. Established railroads, seeking to extend their lines, or to build connections between disjointed parts of their line, must likewise secure the Commission's certificate. Not a few unwise ventures of this character, in periods of highly competitive railroad building, had overloaded main stems with unprofitable branches. The Commission's certificate is not, however, required for improvement of an existing line, although investment of this character will quite certainly increase the "value" of the railroad property on which the fair return of the rule of rate making is to be calculated.

The most interesting deduction made from the rule that no extension may be made without authority from the Commission, is the drastic provision, likewise a part of the 1920 amendment, asserting the power to require, under certain conditions, the building of railroad extensions.[1] In rather loose language Congress authorized the Commission to require a carrier by order "to extend its line or lines" provided that such an order should not be made until the Commission found the extension reasonably required in the interest of public convenience and necessity, and the expense involved not such as to impair the ability of the carrier to perform its duty to the public. The first case submitted to the Commission under the new statute involved an extension of a line of railroad into an agricultural district in Nebraska. The complaint was dismissed on the merits of the case. The contention of the railroad company that the statute was an invalid exercise of Congressional power was not passed upon.[2]

An examination of the statute shows that the assertion of

such lines cannot assume common carrier functions without approval of the Commission. Certificate for the Chaffee R. R. Co., 70 I. C. C. 690.

[1] Interstate Commerce Act, Sec. 1, Par. 21.

[2] Cooke *v.* C. B. & Q. R. R. Co., 66 I. C. C. 452.

power is in the broadest possible terms. The statute does not purport to be limited to an extension of a few miles or within a specified territory, but under its terms there is no stated limit. It is conceivable, however immediately improbable, that an order might be issued requiring a railroad of the Middle West to extend its lines to either the Pacific or Atlantic Coast, or to the Gulf of Mexico, provided it was found by the Interstate Commerce Commission that the extension would be in the interest of public convenience and necessity, and also, that the company's ability to "perform its duty to the public" would not be impaired. Exactly how the financing would be done would be another question, but one so important that it is unlikely that the construction of long or expensive extensions will be required.

Heretofore, the theory of public regulation of common carriers has concerned itself with obligations which these corporations have held themselves out as undertaking to perform. This is in conformity with the theory of the railroad as announced by the Supreme Court.[1] Capital expenditures have been required by the public and the requirements upheld by the courts, when the result of police regulations designed to secure adequacy of the service which the carrier had undertaken. It is true, also, that railroad corporations, as all other citizens, have been held to be subject to the police power of the states and to the general legislative power of the nation, in so far as exercised to promote the health, safety and morals of the people. But where a requirement had been made which concerned matters as to which there had been no specific undertaking by the carrier, it has been held void, even though its fulfillment might be of great convenience to the public. Thus a state cannot require a railroad company to surrender portions of its right of way for the location of grain elevators.[2] Neither can it order the indiscriminate construction of switches and side tracks.[3] Nor can it require the construction of track scales, convenient for the public, but in fact not essential to the service of transportation offered by the company.[4]

[1] Northern Pacific Ry. Co. *v.* N. D., 236 U. S. 585, 595.
[2] Mo. Pac. Ry. Co. *v.* Neb., 164 U. S. 403.
[3] Mo. Pac. Ry. Co. *v.* Neb., 217 U. S. 196; Oregon R. R. & N. Co. *v.* Fairchild, 224 U. S. 510.
[4] Great Northern Ry. Co. *v.* Minn., 238 U. S. 340; Great Northern Ry. Co. *v.* Cahill, 253 U. S. 71.

It is thus to be observed that an order by a public body requiring a railroad corporation to invest in a permanent undertaking of a new nature is a drastic measure without precedent in our theory of railroad regulation. The requirement that investors secure a certificate of convenience and necessity from public authority before engaging in a public undertaking is one thing. Sound considerations of public policy are at stake. But it is quite another matter to require investment regardless of the desire of the owner. While the provision in respect to the compulsory construction of railroad extensions was doubtless viewed by the Congressional mind as a corollary of the prohibition against new construction without public approval, the two provisions have little in common. In the one case the state, or the nation, simply declares that it will not permit the exercise of franchises of a quasi-public character until there shall have been compliance with certain conditions. When investment of private capital, however, is specifically required, the public quite effectively "takes" the property of the private corporation, interferes with the right of management, and negatives the contractual rights of the stockholders in the corporate property. It is doubtful whether this legislation can be sustained.[1] If sustained at all, it is likely to be only on the theory that Congress had in mind simply the supplementing of existing facilities, as, for example, the extension of terminal facilities at a city where the development had spread far beyond the original boundaries. Such a limitation would have to be read into the statute by the courts. Only litigation will determine.

If the power shall be and comes to be generally exercised, it will mark a most drastic encroachment upon the right of management and upon the property rights of stockholders thus far made by regulation. Regardless of the desirability from an economic standpoint of a new railroad construction in undeveloped portions of the country, it is clear that the assertion by the government of the right to direct the form and manner of investment of private capital is an entirely new concept of public right in respect to private property.[2] For the government, at

[1] See Kenneth F. Burgess, "Compulsory Construction of New Lines of Railroad," *Michigan Law Review*, Vol. 20, p. 699.

[2] There is hardly precedent for this assertion of power in the requirement of the Act which makes it the duty of a railroad to construct, main-

public expense, to undertake to provide public conveniences is one thing; for the government to require construction of new enterprises by private capital is another. Roads might be required to extend their lines into undeveloped territory, with the hope, or upon an expectation, which later failed to materialize, that traffic would develop. Obviously there could be no surer way of discouraging investors from entrusting their savings to a venture subject to such risks. Such interpretation of the law is possible, but not probable. In view of other provisions of the Transportation Act it seems clear that Congress could not have intended to confer the very sweeping power which a casual reading of the statute might indicate.

§ 3. In addition to dealing with new construction of railroads, the public has for many years asserted the right to regulate the abandonment of railroad enterprises. The power has been exercised by acting to prevent the abandonment of a railroad property which had been constructed and put in operation.[1] In reviewing some of these assertions of power, the Supreme Court in recent years has announced the limitation that the police power of the state cannot require private corporations to continue operation of a railroad at a loss,[2] unless such operation is a positive requirement of the charter or franchise under which the cor-

tain, and operate "upon reasonable terms" a switch connection with any lateral branch line of railroad or private side tracks, provided such connection is "reasonably practicable and can be put in with safety, and will furnish sufficient business to justify the construction and maintenance" and which grants power to the Commission to order installation of such switch connections. This provision calls for a relatively inexpensive installation with existing facilities, and is aimed at preventing discriminatory practices, as is apparent from a reading of Ridgewood Coal Co. *v.* L. V. R. R. Co., 21 I. C. C. 183, and at providing through facilities, the Commission's power being limited to requiring connection with carriers which are truly lateral lines, and not competitors: U. S. *v.* B. & O. S. W. R. R. Co., 226 U. S. 14, overruling C. & C. Traction Co. *v.* B. & O. S. W. R. R. Co., 20 I. C. C. 486. In any case it is clear that the power of the Commission stops short at the right to require a connection with an existing side track, and does not extend to the building of such a track. Nat'l Industrial Traffic League *v.* A. & R. R. R. Co., 61 I. C. C. 120, 121, and Schlichter *v.* Director General, 62 I. C. C. 181, citing Winters Metallic Paint Co. *v.* C. M. & St. P. Ry. Co., 16 I. C. C. 587, Ralston Townsite Co. *v.* M. P. Ry. Co., 22 I. C. C. 354, Virginia Coal & Fuel Co. *v.* N. & W. Ry. Co., 55 I. C. C. 61.

[1] Gates *v.* B. & N. Y. Air Line R. R. Co., 53 Conn. 333; C. & A. R. R. Co. *v.* Suffern, 129 Ill. 274; Attorney General *v.* West Wis. Ry. Co., 36 Wis. 466.

[2] Brooks-Scanlon Co. *v.* R. R. Com. of La., 251 U. S. 396; Bullock *v.* Fla. R. R. Com., 254 U. S. 513.

poration continues to assert rights.[1] In other words, the corporation possesses the power to change the use of its property in order to avoid confiscation. This is a sensible doctrine because a railroad which finds itself operating for a definite period at a financial loss could not come to any other end than the scrap heap. The stockholders are under no obligation whatever to reach into their own pockets to pay deficits, though for a short period, it may be to their interests to do so. The liability of a stockholder in a railroad corporation is no different than the liability of a stockholder in any other corporation. He has no obligation to pay assessments to cover deficits. His liability is limited to the investment in the stock.

By the Transportation Act, 1920, Congress legislated in this field. As the law now stands, a railroad may not be abandoned without the approval of the Interstate Commerce Commission,[2] and parties who are adversely affected are given the right to appeal to the courts for an injunction to prevent abandonment prior to a granting of permission.[3] Mere relocation, however, is not abandonment.[4] Within the first year of the operation of this provision of Federal law, application was made to the Commission for permission to abandon considerable trackage, and permission was granted in respect to 700 miles of line, usually short lines or branches. Such permission has been granted only in the clear case where the facilities served no useful purpose, because transportation needs could be served by other agencies, or where the railroad had been operated at a loss and had no prospect of earning operating cost.[5] The Pere Marquette was permitted to abandon a branch line "where practically no business" was available and there was no prospect of industrial or agricultural development.[6] The Commission has, however, de-

[1] Mo. Pac. Ry. Co. *v.* Kans., 216 U. S. 262, 276.

[2] Interstate Commerce Act, Sec. 1, Par. 18.

[3] *Ibid.*, Par. 20.

[4] Public Convenience Application of Pearl River Valley R. R. Co., 67 I. C. C. 748.

[5] Certificate for Eastern Texas R. R., 65 I. C. C. 436; Certificate to A. T. & S. F. Ry. Co., 65 I. C. C. 386; Certificate for Northern Pacific Ry., 65 I. C. C. 750; Certificate for Gulf, Mobile & Northern, 65 I. C. C. 426.

[6] Certificate for Pere Marquette Ry., 65 I. C. C. 410. See also abandonment applications, as follows: Public Convenience Certificate to A. T. & S. F. Ry. Co., 67 I. C. C. 145; Public Convenience Certificate to Seaboard Air Line Ry. Co., 67 I. C. C. 258.

clined to approve a rule that branch line abandonments be permitted because the branch line itself cannot be operated so as to be self-sustaining, while the carrier from its operations as a whole is making money.[1] The public convenience must be consulted in such cases.[2]

Main lines abandoned were those of short line railroads. The most considerable abandonment which has been approved is that of the Chicago & Indiana Coal Railway, the LaCrosse-Brazil, Indiana, line of the Chicago & Eastern Illinois, 162 miles in length, an abandonment authorized in May, 1922.[3] This line was left out of the reorganized C. & E. I. and its bondholders were unwilling to buy equipment. In 1921 the most considerable abandonments approved had been those of the Duluth & Northern Minnesota (100 miles) and of the Hawkinsville & Florida Southern Railway Company (93 miles).[4] The story is the same in all these cases, the inability of isolated railroads to pay their way in the face of advanced costs of operation.[5] Portions of both the Chicago & Indiana Coal Railway and of the Hawkinsville & Florida Southern were later operated by companies organized by local interests.[6]

[1] Public Convenience Application, G. B. & W. Ry. Co., 70 I. C. C. 251, citing A. C. L. R. R. Co. *v.* N. C. Corp. Com., 206 U. S. 1; Mo. Pac. Ry. Co. *v.* Kans., 216 U. S. 262; Puget Sound Tr. Co. *v.* Reynolds, 244 U. S. 574; Groesbeck *v.* D. S. S. & A. Ry. Co., 250 U. S. 607.

[2] In the Green Bay & Western Case, however, it was provided that abandonment would be considered if arrangements to furnish service over part of the branch could be perfected. In Public Convenience Application, Atlanta & St. Andrews Bay Ry. Co., 70 I. C. C. 313, decided Aug. 6, 1921, the Commission, acting against the recommendation of the Railroad Commission of Florida, which heard the case for the Commission, directed discontinuance of operations during a test period but directed that no steps to dismantle the line should be taken until further order.

[3] Abandonment of line by the Chicago & Eastern Illinois R. R. Co., 71 I. C. C. 609.

[4] Public Convenience Certificate to Duluth & Northern Minnesota Ry. Co., 70 I. C. C. 184; Abandonment of Hawkinsville & Florida Southern Ry. Co., 70 I. C. C. 566.

[5] The closing of lumbering operations depended upon for the principal traffic has accounted for a number of the abandonment orders: Public Convenience Certificate to Kentwood, Greensburg & S. W. R. R. Co., 70 I. C. C. 201; Public Convenience Certificate to Kinder & N. W. R. R. Co., 70 I. C. C. 189; Public Convenience Certificate to Liberty-White R. R. Co., 70 I. C. C. 411; Public Convenience Certificate to Delta Southern Ry. Co., 70 I. C. C. 184.

[6] The Chicago, Attica & Southern R. R. was organized to take over and operate the northern part of the coal road, the other portion having been bought by the Cincinnati, Indianapolis & Western. The stock in the new

In the case of the Eastern Texas Railroad Company the Commission authorized the abandonment of thirty miles of railroad but provided that persons interested in the community might purchase the line for $50,000, the figure at which the railroad company had offered to sell the portion to be abandoned. If these communities wanted a continuance of unprofitable railroad service, the Commission expressed the view that they could pay for it.[1] The Commission's order in the Eastern Texas Case was, however, taken to the Supreme Court of the United States, which, March 13, 1922, set it aside on the ground that the order undertook to authorize the abandonment of a railroad enterprise not only in respect to interstate commerce, but also as to its intrastate operation. The railroad lay wholly within the state of Texas. The Court held that the Commission had no jurisdiction over the abandonment of intrastate operation where it could not be shown that the continued operation in intrastate commerce would be a burden on interstate commerce.[2]

The full scope of the limitation upon the Commission's powers has not been determined, but it will doubtless call for further

company was sold to farmers, mine owners, and grain elevator operators along the line. *Commercial & Financial Chronicle*, Vol. 115, p. 1631.

Acquisition of Line by Chicago, Attica & Southern, Finance Docket No. 2595, decided Nov. 27, 1922.

In Finance Docket No. 2334, a certificate of public convenience and necessity was granted to the Georgia, Ashburn, Sylvester & Camilla Ry. to take over 51 miles of the Hawkinsville & Florida Southern. In the order permitting the abandonment of the latter the Commission had suggested that the receiver offer the entire line for sale as a going concern and that, if no satisfactory bid was received, he offer the road for sale in sections for continued operation. The applicant company had been formed for the latter purpose. The Commission said:

"Considered as an enterprise involving new construction of 51 miles of line, it could hardly be said that the project promises the measure of success that should be shown in order to justify such an undertaking. However, the line is in existence, and apparently it can be made to serve several communities as to which the hardship of abandonment was fully shown in the former proceeding. In view of the fact that the people who are dependent upon the line for transportation facilities desire to preserve the service, if possible, and are prepared to finance the plan and thus assume the burden, we think the applicant should be given the opportunity to undertake the operation of the property." Public Convenience Certificate to G. A. S. & C. Ry. Co., 71 I. C. C. 616.

[1] Certificate for Eastern Texas R. R. Co., 65 I. C. C. 436. This attitude is consistent with the approval of an application by new corporation, whose stockholders were citizens of a community desiring railroad service, to take over a short local line of railroad in Wisconsin: Certificate for Central Wisconsin Ry. Co., 65 I. C. C. 747.

[2] State of Texas *v.* Eastern Texas R. R. Co., 42 Sup. Ct. Rep. 281.

amendment of the Congressional Act. It is quite as impossible to treat separately the interstate and the intrastate business of a single carrier in respect to certificates of convenience and necessity and authorization for abandonments, as it is to separate their activities in respect to car distribution or the application of safety devices. An attempt to draw such a distinction cannot long persist.

In summary of the activities of public regulation as disclosed in this chapter, it may be said that there can be no doubt of the right of the public to prevent new railroad construction in the absence of specific authorization. This right is generally exercised through the control of certificates of convenience and necessity. It is true also that the public may require the continuance of operation of railroad property once impressed with a public use up to the point where confiscation of private property would result. But the right of the public to require new undertakings by private capital in respect to the construction of new lines of railroad is thus far without judicial approval. Its assertion in the Interstate Commerce Act is a distinct novelty.

PART IV

MANAGEMENT

CHAPTER XXI

THE FUNCTION OF RAILROAD MANAGEMENT

§ 1. If the public obligation of railroad management is to provide adequate and non-discriminatory service at reasonable and non-discriminatory rates, its private obligation is to earn profits. Railroad regulation cannot ignore this basic relationship so long as private ownership is depended upon to furnish railroad service. In those of its purely business relations which are maintained with owners and creditors, a railroad corporation is a private enterprise. It is owned, controlled and managed in the interest of investors. Exclusively individual ownership and personal management have seldom been possible because of the large sums necessary to provide the permanent way and the carrier equipment.[1]

The corporate form of organization, therefore, found early use in bringing together the aggregate capital needed in railroad

[1] The Florida East Coast had its beginnings in the Jacksonville, St. Augustine & Indian River Ry., a narrow gauge line, laid with 30 pound rails, completed to St. Augustine in 1883. Mr. H. M. Flagler became President of this road in 1886, and his energy guided the subsequent history of the line, including the extension to Key West. The original line was standard gauged in 1889. The name of the company was changed to Florida East Coast in 1896, by which time end-to-end consolidation and construction had carried the road to Palm Beach. In 1896 the extension to Miami was completed. In 1894, the Secretary of the company wrote: "As no one but Mr. Flagler is interested in the J., S. A. and I. Ry. Co., he does not desire to give publicity to the affairs of the road till its completion." (Poor's Manual, 1895, p. 194.) The entire issue of first mortgage bonds was in 1907 available as security for note issues floated to finance the building of the Key West line. These notes were also personally guaranteed by Mr. Flagler. Against the property there was in 1921 a $12,000,000 first mortgage issue in the hands of the public, a $25,000,000 issue of income bonds, owned by the Flagler estate,

building. By limiting risk and liability for the individual stockholder to the investment in his stock ownership, it has made possible the achievement of railroad building by private capital. The very operations of dividing up the ownership and functioning through an artificial person have destroyed, to some extent, the direct responsibility which faces the management of smaller enterprises. The personality of the railroad is typified by the official personnel with which the public comes in contact and not by the security holders the management legally represents. The railroad has been thought of as something apart from its owners. Since the law operates upon the artificial person, the railroad corporation, the fundamental economic responsibility has been hidden. But, in its relations with its owners, a railroad is not different from other business enterprises. If it earns profits, it is a success; if not, a failure.

§ 2. The character of the relationship between the active managers of a railroad and its stockholders is such as to bury deeper the sense of this economic responsibility. The participation of stockholders is presumed in law to be secured by their election of directors. But the typical board of directors is pretty much a self-perpetuating body. The army of small stockholders who cannot attend the annual meeting usually sign printed proxies sent from the company office. The dominant group in a directorate, through votes controlled by the ownership of stock held in their names, or in the names of business associates, augmented by the proxies of scattered holders, controls the road until good reason appears for its ousting. Unless finances become involved dissension is likely to appear only when control is sought for the purpose of creating or perpetuating a strategic alliance. Such

and capital stock to the amount of $12,500,000 also owned by the Flagler estate, the stock increase being the result of issues sold to Mr. Flagler for funds to complete the line.

The Virginian was also largely financed by a member of the "Standard Oil" group, Mr. H. H. Rogers. This railroad, 442 miles long, from Deepwater, a junction with the Chesapeake & Ohio, to Hampton Roads, it was at first announced, would not be financed until completed. In 1908, a $17,000,000 issue of Tidewater Co. 5-year—6 per cent notes was secured by deposit of first mortgage bonds of the railroad and controlled terminal company. The notes were guaranteed principal and interest by Mr. Rogers, who deposited with the trustee securities having a market value of $10,000,000, and an annual income yield of about $700,000. The road was formally opened for traffic April 2, 1909. On May 9, 1909, Mr. Rogers died. In 1912 the permanent financing was done.

FACILITIES, STEAM RAILROADS—TRACK MILEAGE (ACTUAL FIGURES)—EQUIPMENT (1913, 100 PER CENT)—TRAFFIC DENSITY (1913, 100 PER CENT)—CLASS I RAILROADS (EXCLUDING SWITCHING AND TERMINAL COMPANIES)

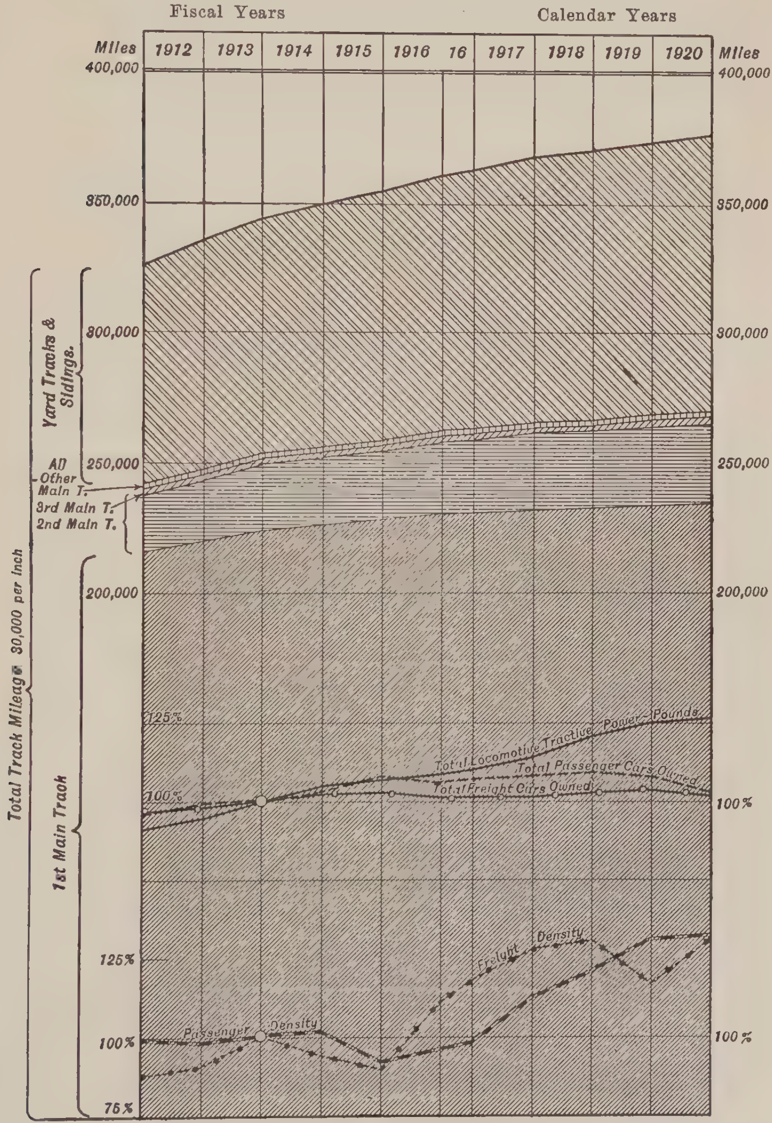


Plate 20.—Railroad Facilities and Business, 1912-1920.

Joint Commission of Agricultural Inquiry; Transportation, p. 233.

instances have recently been so exceptional as to be dramatic.[1] The usual stockholders' meeting is pretty much a cut-and-dried affair: a time for mutual commiseration or congratulation. And the directors, in the eyes of the law, elected by vote of the stockholders are, in practice, elected by each other. The railroad managers, those who dominate its policy, are quite distinct from the rank and file of owners. Yet it is with the management that the agencies of public regulation deal.

§ 3. The course of business since 1900, and especially since 1908, served to emphasize the critical position of railroad credit. Not only has the condition of unused railroad capacity very generally disappeared, but, in its place, has developed an always impending condition of congestion. It has frequently been a case of "trying to force a 3-inch stream through a 1-inch nozzle." The extraordinary demands for service, emphasized in periods of "car shortage," have occurred in the face of considerable increases in road facilities. There has been a startling encroachment of traffic upon unused capacity. In 1908 there were 230,494 miles of first track operated; 23,699 miles of second track or additional main track; 79,453 miles of yard track and sidings. For 1921, corresponding figures were 259,582 miles, 36,657 miles and 109,592 miles. The percentage of increase was, for main line track, 15 per cent; for additional track, 52 per cent, and for sidings, 37 per cent. The number of locomotives had increased from 57,698 to 68,552; the number of freight cars from 2,100,784 to 2,389,264. These were increases of 18 and 14 per cent, respectively. But the number of ton miles had increased 90 per cent and the number of passenger miles, 63 per cent. Only by increasing the tractive power of locomotives, and the average capacity of freight cars, by increasing the tons per loaded freight car, and the tons per freight train, and by increasing the number of passengers per car and per train, was the business handled at all.

Improvements to the permanent way could be financed only by the issue of securities, stocks or bonds, junior to the underly-

[1] The notable instances of recent history are linked with the name of Mr. Harriman: his ousting of Stuyvesant Fish, for 20 years President of the Illinois Central, in November, 1906, and the Hill-Harriman struggle for the Northern Pacific. The stories are told from the Harriman viewpoint in George Kennan's biography, *E. H. Harriman*, Vol. 1, pp. 286 to 310 (Northern Pacific); Vol. 2, pp. 42 to 65 (Illinois Central); and see Harriman *v.* Northern Securities Co., 197 U. S. 244.

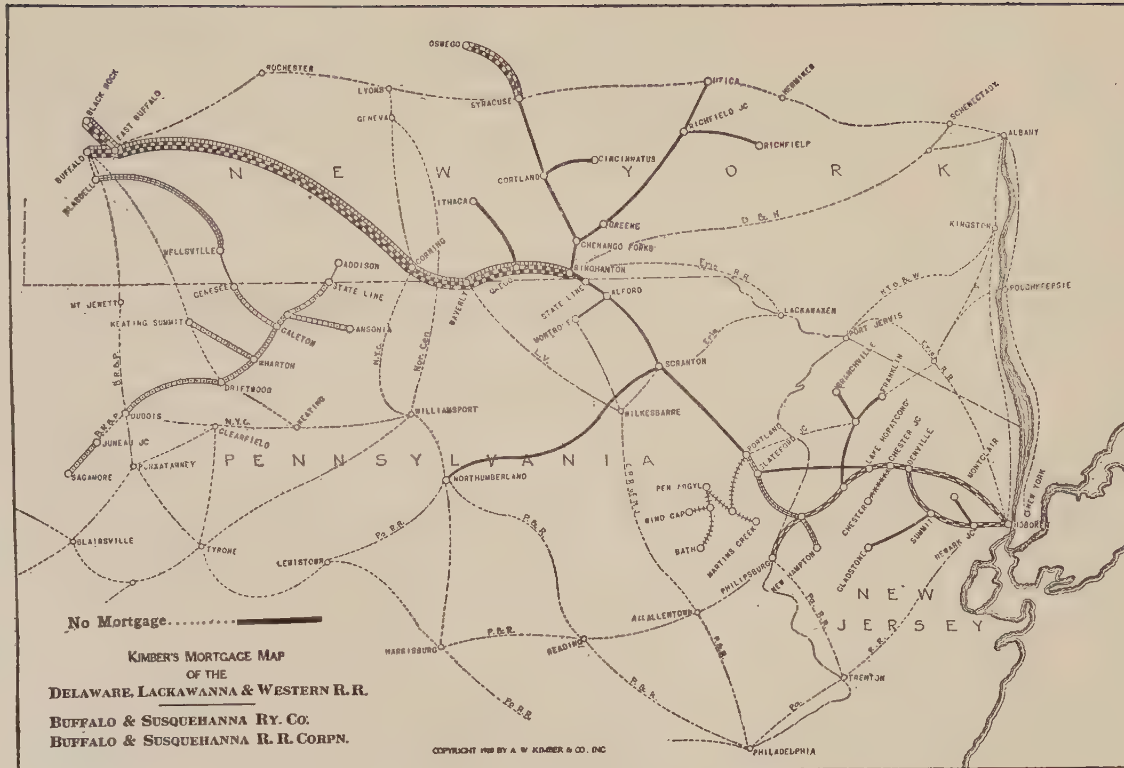

No Mortgage
KIMBER'S MORTGAGE MAP
OF THE
DELAWARE, LACKAWANNA & WESTERN R.R.
BUFFALO & SUSQUEHANNA RY. CO.
BUFFALO & SUSQUEHANNA R. R. CORPN.
NEW YORK
PENNSYLVANIA
NEW JERSEY
BUFFALO
BLACK ROCK
EAST BUFFALO
ROCHESTER
LYONS
GENEVA
SYRACUSE
OSWEGO
UTICA
RICHFIELD JC
RICHFIELD
CINCINNATUS
CORTLAND
ITHACA
GREENE
CHENANGO FORKS
BINGHAMTON
ALBANY
SCHENECTADY
KINGSTON
POUGHKEEPSIE
WELLSVILLE
ADDISON
STATE LINE
GENESEE
MT JEWETT
KEATING SUMMIT
GALETON
ANSONIA
WHARTON
DRIFTWOOD
DUBOIS
JUNEAU JC
SAGAMORE
CLEARFIELD
WILLIAMSPORT
WAVERLY
CORNING
ALFORD
SCRANTON
WILKESBARRE
LACKAWAXEN
PORT JERVIS
FRANKLIN
PORTLAND
LAKE HOPATCONG
CHESTER JC
DENVILLE
MONTCLAIR
NEW YORK
CHESTER
SUMMIT
NEWARK JC
GLADSTONE
PEN ARGYL
WIND GAP
BATH
MARTINS CREEK
PHILIPSBURG
NORTHUMBERLAND
BLAIRSVILLE
TYRONE
LEWISTOWN
HARRISBURG
READING
ALLENTOWN
TRENTON
PHILADELPHIA
D. & H.
Erie R.R.
L.V.
P. & R.
Pa. R.R.

PLATE 21.

ing liens. Most main line track is already well "plastered" with mortgages securing bond issues. For improvements of these lines, as distinguished from extensions, it is seldom possible to offer bonds which are "close to the rails." Occasionally new bonds of a large refunding issue, of which the total amount authorized has not been sold, will, when issued, participate equally with that part of the issue outstanding. For most roads, however, mortgages are piled on the strategic portions of the line. On that portion of the Erie which extends from Piermont to Dunkirk, the original line, there are no less than nine mortgages, laid one on top of the other. This is the extreme case; but even the main line of the New York Central has five mortgages against it; of the Norfolk & Western, four; of the Burlington and Northern Pacific, three; and of the Union Pacific, two. The Delaware, Lackawanna & Western, with large portions of its line unmortgaged, is quite the exception. Since underlying bond issues have not been available, railroad managers have found that they must resort to security issues possessing junior liens. On these it has been necessary to pay a higher rate of interest to compensate for the risk assumed by the purchaser. A few issues were baited with conversion privileges: the right to surrender the bonds for shares of stock at a stipulated price. But this privilege could only be effective when there was reasonable assurance of the maintenance of dividends. As for sales of stock proper, that soon proved out of the question. After 1907 until 1922 when the Illinois Central, a railroad with a very low capitalization per mile, put out an issue of preferred stock, there was substantially no new financing through sale of stock to investors by established railroads.[1] Obviously, investors would not buy shares of stock

[1] Reduced Rates, 1922, 68 I. C. C. 676, 682. See also *Report of Joint Commission of Agricultural Inquiry: Transportation*, p. 7, to the effect:

"That sound railroad finance requires that a larger part of the capital necessary for railway development and equipment be secured by stock issues instead of by bond issues;" and further:

"In considering the question as to what return railway companies should be allowed to earn, it should be remembered that in the structure of railway credit a proper relation should be preserved between stock and debt. For the last few years it has not been possible for most of the companies to do any financing through the sale of stock. The moneys which they have raised for the most part come from the sale of bonds or from the issuance of some other form of evidences of indebtedness. This method of financing cannot be indefinitely continued. Railroads cannot go on constantly increasing their indebtedness and not building up an

with a contingent rate of income at a high price without confidence in the continuance of the dividend rate.

Nothing in the general situation has encouraged such confidence. Only once since 1907 has the percentage relation of annual railway operating income to investment (as carried on the books of the railroads) exceeded 6 per cent. The proportion of railroad stock paying dividends fell from 65.69 per cent in 1908 to 57.24 in 1920. Even the total amount paid out in dividends fell from $390,695,361 to $328,989,492. The average rate on dividend paying stock fell from 8.07 per cent to 6.51 per cent; but the average rate on all stock fell from 5.30 per cent to 3.72 per cent. There can be no gainsaying that the railroad presidents in 1910 and 1914 indicated the inevitable result. And theirs may be the melancholy complacency of the prophet who lives to see his evil prophecy come true.

§ 4. The really critical aspect of the situation reverts back to the governing economic characteristic of the railroad plant, the necessity for heavy and immediate investment which must be made as a whole, and in anticipation of future development of business. Not a little of the record in the 1910 Rate Advance hearing was filled with testimony about the great "unproductive improvements" made for the "benefit" of the public. Track elevation, elaborate station buildings, safety appliance installations, are cases in point. Take the case of track elevation. Laws requiring track elevation have seldom distinguished between the road with surplus earnings and the road barely meeting fixed charges. When earnings have proved insufficient, it has been necessary to resort to security issues to get the necessary funds. Such expenditures add little, certainly in the short run, to the net earnings. The same is true of improved station facilities. Only in the long run can the forces which necessitate the

equity in their properties underlying their debt. When the investor thinks that too large a percentage of the value of the property of a given company is represented by debt and not enough by stock, he will decline to buy further bonds of that company, or if he takes them it will be only at an unduly high interest rate. It is important, therefore, that railroad credit should be so strengthened as to enable a properly capitalized, well-managed company with adequate traffic to do its financing through issues of stock. Stock, being junior to debt, and having no lien on the property or equipment, naturally must bring a larger return in order to be attractive." *Report of Joint Commission of Agricultural Inquiry: Transportation*, p. 315.

improvement make themselves felt in increased earnings: it is because traffic has become dense, because trains must be frequent, because the town is large, that station facilities require improvement or track elevation is necessary for safety. In the case of "unproductive improvements," the underlying economic situation is not greatly different from that when an old railroad is double-tracked or when a new railroad invades a territory as a competitor. Not the immediate, but the ultimate prospect furnishes the inducement. The interim is likely to be a "starving time." But it is quite clear that, if there was no fair expectation that the advantage secured would ultimately compensate the Pennsylvania for the costly terminal on Manhattan Island, it would be difficult to justify the project.[1]

§ 5. The difference between "productive" and "unproductive improvements" is therefore only one of degree. But the practical problem arising from this difference is none the less real. The improvement must be financed in the present, and, if the prospect of return on the new investment is more or less remote, the task of raising the needed funds will be the harder. Commissioner Prouty stated the essentials of the problem clearly in 1911:

> "Between 1896 and 1907 the business of the Southern Pacific over this portion of the Central Pacific, as well as over other parts of its system, largely increased, but it was said in testimony before the Commission that in 1907 the practical limit of the road between these points had been reached, and that if any considerable amount of additional business was transacted it must either be at the expense of economical management or at an enormous cost to provide additional tracks. Assuming this to be so, it is evident that the Southern Pacific profited by increase of traffic up to 1907; it is equally evident that a moderate addition to that traffic might be a damage and not an advantage.
>
> "Assume, for example, that the Southern Pacific had begun in 1907 to double track this piece of road and had completed the work in 1910 at an expense of $100,000 per mile. The amount of traffic handled would not have materially increased. The cost of maintaining the road would be greater. The cost of operation would perhaps be somewhat less, since

[1] The following brief excerpt from the testimony of President McCrea of the Pennsylvania in 1910 is pertinent:

"Mr. Brandeis: And you do not expect to make any returns to stockholders or to the company of any kind upon the $108,000,000 net to be invested there?

"Mr. McCrea: I doubt very much if we will."

Evidence, 1910 Advances, Sen. Doc. 750, 61st Cong. 3d Sess., p. 2297.

the business could be handled to better advantage. The net result would be practically the same, but the cost of the plant would have been increased by an amount requiring on a 4 per cent basis additional net earnings of $4,000 per mile. When it is remembered that the average net earnings per mile of the railroads of the United States for the year 1909 were but $3,505, it will be seen that a considerable period must probably elapse before this improvement would become a profitable one.

"In this illustration increase of business to a certain point is desirable; beyond that point it is undesirable, unless that increase can continue to the further point where the additional track is utilized to an extent which justifies the expenditure. It is manifest that in determining a reasonable rate we could not be guided justly by conditions either in 1907 or in 1910.

"There is some reason to believe that railroads generally in Official Classification territory were in something the same condition in the year 1907 as was this piece of the Central Pacific, according to the statement of its lessee. There had been for some 12 years a rapid and constant development of business, but the feeling had been that this increase could not continue. Railroad operators as a whole had not felt justified in making the outlay which would be required if the growth of business was to continue. In consequence, the facilities of all kinds in that year were inadequate to the traffic offered.

"The business of 1907 was in fact handled, but not in a way satisfactory to the public. As this Commission well understands, from its own investigations, transportation conditions were deplorable. A continuance of those conditions should not have been and would not have been tolerated. It was the duty of our railroads to provide at once increased facilities. That should have been done even though the traffic of 1907 was not to be exceeded."[1]

And, in the meantime, someone must bear the burden. It can be readily understood that, under these circumstances, the cautious railroad manager hesitated to sacrifice the interests of present owners to those of future users.

§ 6. The financing of purchases of improved equipment has been less difficult, because of the development of a device whereby the railroads have been able to finance purchases of equipment by installment payments during the life of the equipment.[2] Title in the cars or locomotives needed is vested with

[1] Advances in Rates—Eastern Case, 20 I. C. C. 243, 282.

[2] See A. S. Dewing, *Financial Policy of Corporations*, Vol. 1, pp. 89–112, and W. E. Lagerquist, *Investment Analysis*, pp. 313–327, for discussion of the equipment trust and securities issued through this device.

Typical Interstate Commerce Commission opinions discussing equipment trusts follow: Atlantic Coast Line R. R. Equipment Trust, 65 I. C. C. 571; Equipment Trust of Bangor and Aroostook, p. 628; Equipment Trust

a third party as trustee, usually a trust company, which makes a conditional sale or lease to the railroad at a rental sufficient to pay interest on securities issued, and to retire them as the equipment is wearing out. Equipment trust certificates or equipment bonds or notes have proved a security attractive to investors, and have made equipment available on favorable terms since the equipment has not been subject to prior liens. The holder of the carrier's bonds has no claim upon the equipment until the debt has been liquidated, and title vested with the railroad company.

It should be recognized, however, that the attainment of economies through the use of more economical equipment is governed by the standards of the permanent way. Larger equipment so frequently means heavier rails, longer passing tracks, stronger bridges and larger tunnels that the railroad manager cannot ignore the character of his line when calculating paper economies which would be attained by securing locomotives capable of pulling larger trains, or by acquiring a supply of larger cars. If improved equipment will entail heavy capital expenditures on the roadbed, already covered by long-time mortgages, it is quite possible that the financial structure of the company will make the attainment of the economies impracticable. It is idle to talk glibly about the economies to be achieved from the use of larger equipment without recognizing that saving money frequently costs money. Consideration of these costs of economy is too often omitted from the discussions of this subject by the uncritical.[1] It cannot be omitted by the railroad manager.

§ 7. Another situation which tended to increase the timidity of investors and so to affect railroad credit adversely arose from the aggressive attitude of the state commissions. It was "good politics" and "fair game" to bait the railroads.

Wisely or no the railroad managers of another generation had felt that, in the interest of the owners, the railroad should have "representatives" in the state legislatures. And, in the revulsion of popular sentiment in the early years of the present century, the

Agreement of the Central of Georgia, p. 773; Equipment Trust of the Pittsburgh & Lake Erie, p. 159; Certificates of Chicago, St. Paul, Minneapolis & Omaha, p. 308.

[1] See, for example, the Exhibits presented by W. Jett Lauck to the U. S. Railroad Labor Board, *Inadequacies of Railway Management*—especially Part III, "Economies through Additional Capital Expenditure."

new generation of railroad executives paid for the sins of the fathers, when the two cent fare laws and low freight rate laws were passed, especially in the West; or when state commissions lowered charges. Those service regulations which railroad managers have insisted were both unnecessary and expensive were imposed. The Interstate Commerce Commission did not participate in these shameless raids on railroad treasuries; but it was helpless to interfere except as it found that state-made rates discriminated against interstate commerce—the doctrine of the Shreveport Case. This was at best a clumsy expedient, for it was necessary for the railroads to inspire complaint by a community which could prove competing interests. It took six years to stretch the doctrine over the intrastate adjustments in the whole state of Texas.[1]

To combat the low rates established by state authorities, the railroad managers, of course, also had recourse to injunctions in the Federal courts alleging that the rates were unconstitutional as taking property without due process of law, in violation of the Fourteenth Amendment.[2] But this was unsatisfactory, and unsatisfactory for several reasons. In the first place, it was necessary, in order to secure the setting aside of the state-made rates, to prove that the rates fixed by state authority were so "unreasonably low" as to be confiscatory.[3] This involved an allocation of value, earnings and operating costs not merely by states, but between state and interstate business within a single state. The character of the costs, and the fact that the same plant and personnel are utilized simultaneously in carrying on both state and interstate business has meant that any allocation must be arbitrary, and therefore readily exposed to attack.[4] It has indeed been difficult to prove confiscation in railroad cases.[5] The out-

[1] The Interstate Commerce Commission reviewed its Shreveport opinions in R. R. Com. of La. *v.* A. H. T. Ry. Co., 48 I. C. C. 312. The problem went twice to the Supreme Court; Houston E. & W. T. Ry. Co. *v.* U. S., 234 U. S. 342; Looney *v.* East Texas R. R. Co., 247 U. S. 214.

[2] Above, Chapter IV.

[3] Minnesota Rate Cases, 230 U. S. 352, 433, and the fuller discussion: Knoxville *v.* Water Co., 212 U. S. 1, 16; Willcox *v.* Consolidated Gas Co., 212 U. S. 19, 41; Louisville *v.* Cumberland T. & T. Co., 225 U. S. 430, 436.

[4] Smyth *v.* Ames, 169 U. S. 466, 543; Minnesota Rate Cases, 230 U. S. 352.

[5] The Supreme Court, however, in Northern Pacific Ry. Co. *v.* N. D., 236 U. S. 585, upheld a lower court ruling that rates on a single commodity, lignite coal, were confiscatory, the conclusion being supported by

standing applications of the doctrine have been in controversies involving purely local public utilities where the problem of allocating costs is much simplified. Finally the very fact that the railroad managers, acting in the interests of railroad security holders whom they were duty bound to protect, had found it necessary to resort to the courts served also to increase the timidity of investors, and to make more difficult the task of securing funds for needed physical improvements.

§ 8. The railroad manager, indeed, found himself between two fires. His public responsibility and his private responsibility apparently were in opposition. From one party, composed of those who used the service, came a demand insisting upon its improvement; from the other party, composed of those who depended upon the railroad for a part and, in some cases, perhaps, the whole of their income, came the pressure for maintenance of dividends. In view of the encroachment of business upon the physical capacity of most railroads, the interests were simply not compatible, especially when a rising level of costs was eating away the differential between gross earnings and operating expense. The real issue was not one of maintaining credit, but of doing justice to the security holders already involved in the enterprise. In emphasizing the credit situation and in seeking to place the Interstate Commerce Commission *in loco parentis* toward the railroads, the railroad presidents, while pointing out a public interest, failed to point out the public responsibility: the responsibility of the public to pay for what it was getting.

This then was the problem faced by railroad management: to furnish adequate service for a reasonable charge, and to earn profits—ends not necessarily incompatible, but, because of the immediate necessity for heavy capital expenditures, extremely difficult to achieve. What would have been the situation had the war emergency not developed, it is fruitless to guess. The war and the attendant rise in prices simply brought home to all the condition which was recognized by railroad managers ten years before.

When the extraordinary demand for transportation service

an allocation of costs to the transportation of that commodity. An allocation to state passenger business was accepted in Norfolk & Western Ry. Co. *v.* Conley, 236 U. S. 605. W. E. Hooper, *Railroad Accounting*, discusses the problem of allocating costs, Chap. XV, p. 423.

arose in 1917, Congress and the President took over the railroads, and by joint use of facilities and unified operation sought to increase their effectiveness. By the use of government credit deficiencies in equipment were supplied. From January 1, 1918, until March 1, 1920, when the Transportation Act went into effect, the railroads (with unimportant "short lines" excepted) were operated by the Federal government. Due to the rapid rise in the prices of material and labor in 1918 and 1919 the expenses of their operation had enormously increased by the time it was proposed to return the properties to their owners. The justice in the insistence of the owners that their properties could not be turned back to them by the government for useful operation without provision to aid them to meet a situation in which they were likely to face a demoralizing lack of credit and income was recognized, even by those opposing the legislation passed.[1] The most significant features of this legislation, the Transportation Act, 1920, were concerned with management: the provision of adequate facilities and the insurance of adequate income; and especially with the rehabilitation of railroad credit as a means to these ends.

[1] Senator La Follette, speaking in favor of his minority report (Sen. Rep. 304, part 2, 66th Cong., 1st Sess.), said:

"The first proposition, namely, that the roads be permitted to revert to private management at once, without any provision for the immediate and future financial assistance of the Government, has no support among the railway executives, and, so far as I know, has little support among the members of the Congress or among the people generally. The reason is obvious. Everyone knows that the railroads of the country, if returned to private hands, are incapable of giving the country decent transportation facilities unless they receive assistance from the Government at once of hundreds of millions of dollars and unless their rates and charges are at once increased. That is what we are confronted with. Every bill and every plan which has been proposed for returning the roads to private management has in some form provided for immediate financial assistance of the roads by the Government and the collection from the public of vastly higher rates and charges than now prevail." (Congressional Record, 66th Cong., 2d Sess., Dec. 13, 1919, p. 502.)

CHAPTER XXII

THE REHABILITATION OF RAILROAD CREDIT

§ 1. The immediate purpose of the Transportation Act, 1920, is pointed out by clauses no longer generally significant. It was recognized that, in the period following the return of the roads to their owners on March 1, 1920, there was danger of general disorganization and perhaps not a little bankruptcy. The railroad managers would have troubles enough getting their properties in hand without attempting to float new loans. Indeed, the outcome of negotiations for settlement of government accounts must in some instances have determined the necessity of seeking such loans. The Act therefore provided for the funding of debts to the government for ten years at 6 per cent with set-offs for sums owed by the government to the railroads. In the second place, $300,000,000 was appropriated as a revolving fund to be lent during the period before March 1, 1922, but for not to exceed five years, "for the purpose of enabling carriers . . . properly to serve the public during the transition period immediately following the termination of Federal control." [1]

[1] To December 1, 1921, the Commission had lent $263,407,717 to 70 carriers including the Baltimore & Ohio, Central Georgia, Rock Island, Erie, Great Northern, Illinois Central, Northern Pacific and Virginian, 35th Annual Report I. C. C. (1921), p. 215.

In allocating the $300,000,000 revolving fund, the Commission limited loans to purposes clearly within the view of the Transportation Act: expenditures needed to enable the applicant properly to meet the transportation needs of the public. Unless such need could be shown the loan was denied. The Commission emphasized the need of self-help, and, on occasion, suggested that interests concerned with securing better facilities should participate in financing. The carriers were not, however, required to borrow on onerous terms in the general loan market. The actual fund was allocated as follows: new equipment, especially refrigerator cars for which

Further to ease over the immediate transition, it was provided that, for six months after March 1, 1920, the rate of compensation paid during Federal control would be guaranteed to the carriers who elected to accept this guarantee. A carrier was not obliged to do so. A few decided to go it alone, because the carrier which did accept was obliged to pay over to the government any excess earned above the guarantee. As matters turned out, it was probably the wise board of directors which played a conservative game and took advantage of the six months' guarantee. The retroactive wage decision, the delay in granting advances in rates, and the business depression inaugurated in the summer of 1920, resulted in conditions not generally anticipated in the earlier months of the year.[1]

To protect the government's interests, the Transportation Act

a pressing need was apparent, $75,000,000; locomotives, especially freight locomotives, $50,000,000; additions and betterments, $73,000,000; maturing obligations, $50,000,000; short line railroads, $12,000,000. Coöperation with the Association of Railway Executives was provided for. The Commission emphasized the need for self-help; applicants were warned that they would be expected to contribute at least 50 per cent of the cost of locomotives, for betterments "as much as within their power," and application to the Commission for help on maturing obligations was always to be a last resort, not a first. Extensions, even the laying of rails on a completed roadbed, were not considered "as necessary" within the meaning of the Act. A loan was, however, granted the Aransas Harbor Terminal Railway in order to assist financing rebuilding after a hurricane. The requirement of the law that there must be reasonable assurance of repayment was also, and necessarily, scrupulously observed. When the prospective earning power, and the value of the security offered (usually bonds or notes of the applicant carrier) did not afford reasonable protection or assurance of ability to repay, the loan was denied. Statements of rules on loans from the fund are found in the Commission's special reports, on that subject, 65 I. C. C. 12, 407. Typical opinions granting loans are: (1) for equipment, Loan to the Chicago, Burlington & Quincy, p. 48; (2) for additions and betterments, Loan to the Delaware & Hudson, pp. 96, 332, 350; (3) for meeting maturities, Loan to the Boston & Maine, p. 1. The Great Northern negotiated a loan of $17,910,000 for all three purposes. Applications were by no means limited to the so-called "weak lines." Loans were denied, *in toto*, in the following typical cases: Maxton, Alma & Southbound R. R. Loan, p. 302; Electric Short Line Ry. Loan, p. 342; Gulf Ports Terminal Ry., p. 421. Frequently loan applications were granted in part: Kansas City, Mexico & Orient Loan, p. 36; Loan to Chicago Great Western, pp. 100, 157, 241, 433, 486, 529. In all cases the references are to Vol. 65 of the I. C. C. Reports—*Finance Reports*.

[1] Important roads which decided not to accept the guarantee were the Southern, the St. Louis Southwestern, and the Pere Marquette. The results are commented upon in the Annual Reports: Southern, 26th Annual Report, p. 4; St. L. Southwestern, 30th Annual Report, p. 9; Pere Marquette, Fiscal year ended Dec. 31, 1920, p. 8.

For a Commission opinion on the guarantee, see Settlement with Norfolk Southern R. R., 65 I. C. C. 798.

further provided that, prior to September 1, 1920 (the end of guarantee period), rates should not be reduced unless approved by the Commission. Likewise, and for the same period, the carriers were forbidden, under any circumstances, to reduce wages fixed by the wartime agencies. This insured against "traffic interruptions": an application of the continuity of service principle.

Beyond the six-months' period, government guarantee was not to go. The railroads were to resume their status as private business ventures managed by boards of directors in the interest of the stockholders. Such railroad securities as came into the hands of the government might be sold, but sold free of government guarantee. Government credit was not to be extended to the carriers, but their own credit was to be rehabilitated, and rehabilitating credit is, after all, largely a task of reëstablishing confidence.

§ 2. In this rehabilitation, the rule of rate making was to be fundamental:

> "In the exercise of its power to prescribe just and reasonable rates, the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient, and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income, equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation."[1]

For the two years ending March 1, 1922, the exercise of discretion by the Commission was, in one important particular, circumscribed. Until then the Transportation Act established 5½ per cent as the measure of a fair return. The Commission might, however, "in its discretion," add to this amount an additional ½ per cent to provide improvements, betterments or equipment, properly chargeable to capital account. In the Increased Rate Case of 1920, the full 6 per cent was used as the basis of calculation.[2] After March 1, 1922, however, the Commission came into control of the situation: and, in determining upon the fair rate of return (which must be uniform for all groups or terri-

[1] Interstate Commerce Act, Sec. 15-a, Par. 2.
[2] 58 I. C. C. 220.

tories), it had full power. Exercising this discretion in 1922, it fixed 5.75 per cent as a fair rate of return.[1] The Act merely directs that the Commission consider, among other things, "the transportation needs of the country and the necessity . . . of enlarging facilities to provide adequate transportation." Under the circumstances, this surely means that the credit standing of the carriers must be the concern of the Commission. As a practical matter, it can mean nothing else.[2]

[1] Reduced Rates, 1922, 68 I. C. C. 676, 683. The Commission observed, however, that a fair return of 5.75 per cent, representing an aggregate net railway operating income arrived at after deducting, among other things, the Federal income tax on a return of 6 per cent, would be approximately the equivalent of a fair return of 6 per cent out of which the Federal income tax was payable.

[2] In Reduced Rates, 1922, 68 I. C. C. 676, 681, the Commission said:

"It is obvious that large additions to capital must continually be made. Most of the capital will have to be acquired through the issuance of securities which must be sold in the markets of the world in competition with other classes of securities. Within the next few years the Government must provide for the refunding of some six billions of its indebtedness. The carriers must attract money by rates of return and stability of investment. While return must not exceed a reasonable charge against the public served, it must be such as to obtain the needed new capital. It is necessary to determine and make public, as required by section 15a, a percentage of fair return. Determination of the percentage implies, or carries with it, no guaranty. Read in connection with the provision for recapture of one half of the excess above 6 per cent it is, instead, a limitation.

"Because the yield on some railroad bonds has declined to something over 5 per cent it does not follow that a fair return should approximate that percentage. We do not deal alone with interest rates on mortgage obligations, or with the more favorably located and prosperous carriers whose credit conditions may enable them to obtain money at relatively advantageous rates. In the recapture provisions Congress recognized that uniform rates on competitive traffic which would adequately sustain all the carriers would produce substantially and unreasonably more than a fair return for some carriers. We should not take the few, and the highest type of their securities, as the basis for determining what shall be a fair return for all. It can hardly be disputed that the carriers of this country should not continue to provide for all needed capital by successive bond issues. Issuance of bonds in a disproportionate degree unduly increases fixed charges, and tends to weaken the credit of the carriers. In such a process eventually a point must be reached where no new capital can be raised, except for short terms at high rates. No substantial proportion of the new capital has been raised by issuance of stock since 1907.

"Notwithstanding the failure of the carriers to earn the 6 per cent allowed in the first two years of operation under section 15a, there is an upward trend in railroad securities, which share in the improved conditions that have prevailed generally in the money market. This is urged upon us as an argument for reduction in the percentage to be determined. Other elements, however, are to be considered. The intent of Congress was to create a steady and reliable flow of money 'for enlarging such facilities in order to provide the people of the United States with adequate transportation.' A substantial reduction in the percentage of return might be un-

From a rule of negation, the valuation doctrine has thus been expanded into an affirmative program. There is even such delegation of power by Congress as comes perilously close to being a delegation of the exercise of its legislative discretion.[1] But the rule of rate making is not a guarantee of earnings, as the carriers were to find out in 1920-22. It is a mere declaration of policy. The responsibility rests with the Commission to fix a general level of rates which, in its opinion, will bring the desired return. This is not a guarantee. The railroads earn it, if they can. When, in 1921, the Commission was convinced that the movement of grain and live stock was being held back by rates so high as to destroy the traffic, rate reductions were recommended or directed in order to increase the carriers' revenues. This was an immediate outcome of the slump of grain and live stock prices.[2]

In the calculation of what would constitute a fair return, measured in dollars, the percentage recognized as a fair rate of

settling in its effect, particularly in light of the fact that the return allowed in 1920 was not realized. The fact that a utility may reach financial success only in time or not at all is a reason for allowing a liberal return on the money invested in the enterprise. Galveston Electric Co. *v.* City of Galveston, 42 Sup. Ct. Rep. 351, decided April 10, 1922."

[1] In the earlier cases the point was repeatedly urged that grants of power to commissions were void as constituting an improper delegation of legislative power which had been entrusted solely to Congress or to the state legislatures by the Federal and state constitutions respectively. See Article I, Section I, Constitution of the United States. This objection to the commission laws was not looked upon with favor by the courts and the grants of power were generally upheld. As to the scope of the restriction on the delegation of legislative power to other branches of the government, see Field *v.* Clark, 143 U. S. 649, and Buttfield *v.* Stranahan, 192 U. S. 470. As to grants of power to commissions, see Interstate Commerce Commission *v.* Goodrich Transit Co., 224 U. S. 194; Louisville & Nashville R. R. Co. *v.* Garrett, 231 U. S. 298; Kansas City Southern Ry. Co. *v.* United States, 231 U. S. 423; Houston E. & W. T. R. R. Co. *v.* United States, 234 U. S. 342. In the later decisions of the Supreme Court the restriction upon the delegation of legislative power is limited to cases where the legislatures undertake to delegate a power which has been specifically and exclusively entrusted to it, such as the delegation by Congress to the states of admiralty jurisdiction, Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149, 159. For a late discussion see Wichita R. & Light Co. *v.* Public Utilities Commission, 43 Sup. Ct. Rep. 51, 55.

[2] National Live Stock League *v.* A. T. & S. F. Ry. Co., 63 I. C. C. 107; Rates on Grain, Grain Products, and Hay, 64 I. C. C. 85; Southern Hardwood Traffic Asso. *v.* I. C. R. R. Co., 66 I. C. C. 68. The "recommendations" in the live stock case were followed by the carriers, and the effect was exactly as though an "order" had been issued, as was issued in the other cases. In Rates on Grain, Grain Products, and Hay, the Commission said at p. 100:

"The really vital concern of the carriers, in this situation, is to promote the return of what may be deemed normal traffic, and anything which will

return is applied to the value of all roads, or upon the value of all roads within any groups which the Commission may establish. The device of throwing all the carriers into one big basket (or into four, as was done in 1920, and later in 1922[1]), avoids the necessity of determining the rate of return to accrue to each carrier. A general level of charges is fixed, and the volume and character of the business done and the cost of doing that business determine the net income. For the individual railroad, therefore, the rate of return becomes a result of the general rate level set.[2] Under a competitive system of transportation it is inevitable that some lines should make greater earnings than others. This is because they possess greater density of traffic, short and direct lines, or a property, because of better grades and less curvature, capable of cheaper operation. Skill in management is not to be ignored. Under a group adjustment, some railroads, because of the varying earning power, may earn little or nothing on their "value," or they may earn 10 per cent or more. Under competitive conditions, it would be quite impossible to establish rates so that each road earned the same rate of return. The principle of equalization governs the establishment of competitive rates.[3]

§ 3. The Transportation Act seeks to maintain this competition, though it proposes to minimize the possibility of the differential returns accruing to the better located, better managed

help toward this end is greatly to their benefit. So far as a tendency downward in their rates can be induced, and so far as the reductions in wages and prices which have already been made effective can be converted into rate reductions, we are assured that the full return of prosperity will be hastened for both industry and labor."

[1] In 1920 four such groups were the basis of calculations: the Eastern group, covering substantially Official Classification Territory; the Southern group, whose boundaries were practically those of Southern Classification Territory; the Western group, extending from the Mississippi to the Rocky Mountains; and the Mountain-Pacific group, from the mountains to the Pacific Ocean. The Mountain-Pacific group was carved out of Western Territory because the Transcontinental carriers were shown to be in substantially better financial condition than other carriers in the Western territory, and because of the generally higher level of rates west of Colorado. Advances were authorized: 40 per cent in the Eastern group; 25 per cent in the Southern and Mountain-Pacific groups; and 35 per cent in the Western group. Increases of 33⅓ per cent were authorized in joint or single line through rates between points in one group, and points in other groups. The same passenger rate advances were approved in all groups—20 per cent. Increased Rates, 1920, 58 I. C. C. 220, 489; Authority to Increase Rates, *Ibid.*, p. 302. The same groupings were utilized in Reduced Rates, 1922, 68 I. C. C. 676, 735.

[2] Above, Chapter VIII, p. 103.

[3] Above, Chapter IX, p. 118.

roads. The voluntary consolidations for which it provides are only in exceptional cases to be monopolistic in their occupation of territory, save on purely local business such as is today largely tributary to a single railroad. The ideal is, however, ultimately to cut down differential returns:

> "the several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties."[1]

Until such consolidations shall be effected, however, and, thereafter, to the extent that the calculations on which the general level of rates shall be fixed prove unnecessarily generous, it is proposed to "recapture" for the public a share of the "excess" earnings:

> "Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of such carriers to receive a *net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property* held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold part of the excess, . . . as trustee for, and shall pay it to, the United States."[2]

The excess so "recaptured" for the public it is planned to utilize in the improvement of railroad facilities. A general railroad contingent fund will be created, and handled as a revolving fund, under the supervision and administration of the Interstate Commerce Commission. The sources of this contingent fund will be two: (1) one-half of any "excess" earnings of railroads above 6 per cent on the value of their property; (2) interest and rentals accruing to the fund. If, under the rule of rate making, any carrier earns in excess of 6 per cent of the value of its railroad property, one-half of the excess may be retained and one-half must be paid into the contingent fund.

[1] Interstate Commerce Act, Sec. 5, Par. 4.
[2] *Ibid.*, Sec. 15a, Par. 5.

§ 4. The Commission will lend this fund to the individual road, either to make new expenditures for capital account, or to refund maturing securities originally issued for capital account; or it will itself purchase equipment or facilities for lease to the carriers. In no sense of the word may these loans or leases be charity affairs. The Commission must scrutinize the essential conditions governing the credit standing of the carriers; for loans, there must be adequate security; for leases, such prospective earning power as to furnish "reasonable assurance" of the prompt payment of rental charges. Loans are to bear interest at 6 per cent, and rental charges must be sufficient to pay this same rate of return plus depreciation allowances. The railroad contingent fund is government property, and around it all proper safeguards must be placed.

Undoubtedly the scheme for the general contingent fund was framed with the weak roads in mind—carriers unable to borrow in the open market except upon onerous terms. But resort to the contingent fund is not reserved to the weak roads, and there is no necessary probability that they alone will participate in its use, unless the stronger roads can borrow in the open market at less than 6 per cent. Much depends on the sums available, and the closeness in the scrutiny of the security offered. Obviously no railroad can furnish better security to the Commission than it can offer in the general loan market. Still, the pressing need for permanent improvements, including those of an unproductive character, must, in the future, appear on those lines now suffering from unused capacity. These "weak" lines, because of the narrow margin between gross earnings and operating costs have, in the past, been unable to finance improvements. These are the roads most likely to need help, and yet those least likely to be able to satisfy a governmental body of their right to receive it. Private investors can be tempted to take a chance; not so the governmental body. The administration of the contingent fund will call for almost statesmanlike caution. Whether, under these circumstances, the contingent fund can really do much for the weak lines by furnishing means of financing any considerable improvement of inadequate facilities seems extremely doubtful.[1]

[1] A clear distinction must be drawn between the furnishing of equipment and loans for permanent improvements. Cars and locomotives are a sort

If their credit is ever to be "rehabilitated" their final disposition must be absorption by the stronger competitors and connections. Indeed, toward this ultimate solution of the problem, the Transportation Act looks, when it directs the Commission to prepare and adopt a plan for consolidation of the railroads into a limited number of systems.[1]

The rule of rate making, it should be clear, introduces an entirely new principle into the regulation of railroads: the doctrine that earnings accruing to a private corporation above a level necessary to establish firm credit are held in trust for the public. There have been foreshadowings of the doctrine in the pleas made in rate cases that property representing surplus should not be included in the value on which the rate of return is calculated. Such pleas had not been seriously received, fundamentally because they represented an attempt to confiscate past profits, legally earned, and disposed of according to law.[2] But now the doctrine of the rule of rate making clarifies the issue: earnings

of free working capital and can be transferred, if need be, from one carrier to another. The experience of private interests in financing rolling stock and motive power through the device of the equipment trust has demonstrated the safety of loans based on security of this character. But permanent improvements are "capital sunk in the soil," like the tiling of a field—useful in no other place, and specialized in character.

[1] Below, Chapter XXVII, p. 410.

[2] See Homer B. Vanderblue, *Railroad Valuation*, pp. 171-3, and the cases there cited. In Stock of Delaware, Lackawanna & Western R. R., the Delaware, Lackawanna & Western Stock Dividend Case, the Commission said:

"Where the public has found it expedient to adopt a *laissez faire* policy to encourage utility development, it cannot be said that profits have been illegally collected in the absence of regulation. The title to the surplus has vested without limitation or condition in the corporation and benefits the shareholder. The doctrine of implied trust sometimes applied by courts and commissions to donated property has no application to excessive return, for the payment of rates carried with it no requirement that the funds be left in the business or used for the public benefit. Its strained application to carriers who have made additions and betterments from surplus would only penalize those who came nearest to benefiting the public. The surplus from income was unrestricted legal property of the company and ceased to be funds of the public before the decision to divert it to either dividends or additions or betterments was made." 67 I. C. C. 426, 432.

Commissioner Eastman's dissent in the Burlington Stock Dividend Case, Stock of Chicago, Burlington & Quincy R. R., 67 I. C. C. 156, 176, contains the following comment on this argument, presented also in that case:

"It is not a sufficient answer to this doctrine to say that the property acquired from surplus earnings is owned by the carrier, for the rights of ownership are not absolute, but limited by the dedication of the property to the public use and the circumstances of such dedication. Nor is it enough to say that the surplus might have been distributed to the stockholders at the time it was earned, for the public might well have declined

are divided into the three categories: (1) the fair return, (2) the railroad share of the "excess," and (3) the government share.

§ 5. The exact use of the carrier's half of any excess earnings is not clear from the text of the Act. It may not be paid out in dividends until a reserve fund of at least 5 per cent of the value of the property has been accumulated. Whether this fund must be kept apart in liquid assets, or may be reinvested in the property, is not specifically provided. The act is ambiguous, whether purposely so, or because of a vague appreciation of the meaning of a reserve as carried on the books, cannot now be said. But the relation to credit rehabilitation must differ, depending upon the disposition of the funds accumulating in the reserve. It may be drawn upon only to pay interest, dividends or rentals to the extent that income for any year falls below the 6 per cent level, and once depleted, must again be accumulated. If the provision is solely to insure regular payments on securities, including dividends on stock, and so to assist in maintaining credit, the conclusion seems inevitable that the fund should be kept apart in liquid form. If the desire is only to increase the equities of security holders (and in this manner to bolster credit), the fund may be treated exactly as "surplus" is treated—reinvested in the property. Once reinvested it must be tied up directly with the general fortune of the enterprise, and so be least available when most needed. Drawing on the reserve, by securing funds elsewhere (perhaps by borrowing), and writing down its amount, would be sure notice of trouble. But, since only the stronger roads can hope to build up a reserve, it is possible that the instances, in which financial difficulty might, on this account, occur, may be minimized.

The railroad surplus accounts may continue to grow. Even 6 per cent on the value of the railroad property may mean 8 or 9 per cent on the capital stock, depending upon the ratio of stock to bonds, of stocks and bonds to value, and upon the rate of interest paid upon bonds. Even with a reserve fund accumulated, as provided in the Act, it is quite possible that the full amount

to acquiesce in rates producing excess income if that income had not been used for the improvement of the property. The question has many aspects. It would be a curious anomaly to accept the theory that rates should be high enough to permit the investment of income in non-revenue-producing improvements and then hold that a company may exact a return upon such property."

available would not be entirely distributed each year. To the extent that the surplus is ploughed under, without increase in the outstanding securities, the equities of existing issues will be increased, and, to a degree, the credit standing improved. Conceivably "unproductive improvements" can be financed in this manner, and, to the extent that this is possible, new securities need not be issued.

Because of a curious twist in the reasoning, the proposal to recapture excess earnings has not been demonstrated in its true character. It is, in fact, the doctrine of Henry George applied to the better managed, better located railroads. Not all of the increased traffic which has served to fill up the unused capacity of the railroads is the result of railroad effort. It is generally true that, in the course of time, population filters in, industries and groups of industries concentrate, and traffic density increases from social, economic, and even natural causes. Sometimes, indeed, the increase in business is purely fortuitous, as when oil developments added traffic for the Burlington and Northwestern in and out of Casper, Wyoming, and for the Texas & Pacific, west of Fort Worth. To be sure, efficient management in seeking businesses for locations, and locations for businesses, and in establishing favorable rate structures (such as those which fostered the Pacific Coast lumber industry) has been a not inconsiderable factor in building up the traffic density of the railroads. Sometimes, too, railroad management, seizing upon the strategic location of disjointed lines, has built a connection which made possible the intensive operation of what formerly was an isolated branch. Thus the Norfolk & Western and Atlantic Coast Line jointly built the Winston-Salem Southbound as a short cut into the Southeast; and, farther west, the Carolina, Clinchfield & Ohio, by connecting up with a branch of the Chesapeake & Ohio into the Southeastern Kentucky coal fields, opened another short route. Mr. Mellen cited the greater use of the Central New England-Poughkeepsie bridge route as an achievement of his administration of the New Haven.[1] The added traffic accruing

[1] The New England Investigation, 27 I. C. C. 560, 586. The development of the Atlanta, Birmingham & Atlantic and Georgia & Florida from disjointed local lines are recent illustrations of the same principle, financed during the boom of the first years of the century and since chronically bankrupt.

Control by the Chicago, Milwaukee & St. Paul, of the Chicago, Terre

to utilize the unused capacity is analogous to added business done at a particular corner, or on a particular trading site.

§ 6. During the period when unused capacity is the typical condition, increasing returns result in earnings which appear to expand much as "unearned increments" develop in the rent of lands devoted to other purposes.[1] A railroad site, like a trading site, becomes more valuable only when it is used more profitably. These increasing returns accrue more rapidly for the lines which have better locations, and so have an advantage in operating conditions. Most usually these lines are the older roads which followed the water grades, occupied mountain passes, and secured favorable urban terminals. In the city, the business houses have located where sidings could be installed. To the older lines, therefore, are attached the established pioneer business enterprises. Undoubtedly, the emergence of unearned increments in railroad earnings would have been the clearer had not competitive rate reduction, due to the same circumstance tending to create increasing returns, the existence of unused capacity, cut the general level of rates. To recapture a part of any unearned increments in the future, and, at the same time, to provide adequate facilities through encouragement of private investment in the railroads, is the hope of the new policy. But, so long as other owners of land to whom an "unearned increment" accrues, by virtue of forces outside their control, are permitted to hold the full amount of their return, the present policy clearly discriminates against railroad owners. This is what was meant by the earlier statement that the recapture clause is an application of the

Haute & Southeastern, made the Chicago, Milwaukee & Gary, an "outer belt line," of strategic value to that system as a route of interchange between two parts of the St. Paul which otherwise had system connections (and then only by belt line) at Chicago. The prospective increase in traffic, on the Gary, caused application to the Commission for permission to build from Aurora to Joliet, Illinois, in order that the line of the Elgin, Joliet & Eastern between these points, over which the Gary had trackage, might be relieved. Public Convenience Certificate to the C. M. & G. Ry. Co., 70 I. C. C. 846.

[1] There is a direct causal relation between the rent for any building site and the value of that site; the value of a site is determined by dividing the amount which will be paid for the use of the site during a year by the current rate of interest. The value is determined by the rent, not the rent by the value, however much the careless talk of the street may have reversed the reasoning. See F. W. Taussig, *Principles of Economics*, 3d Rev. Ed., Vol. 2, p. 103, and Homer B. Vanderblue, "Railroad Valuation and the Unearned Increment," *Railway Age*, Vol. 68, p. 1105.

doctrine of Henry George. It means, after all, a taking of an unearned increment from one class of property owners in the community while permitting others to receive it. This may be desirable policy for the country to adopt. Desirable or not it has been adopted.

The recapture of earnings clause must still run the gauntlet of the courts. Its constitutionality is certain to be attacked: "no person shall . . . be deprived of property without due process of law, nor shall private property be taken for public use without just compensation." It will surely call for judicial genius to square the recapture of earnings clause with this, the requirement of the Fifth Amendment to the Constitution. Even though the whole proposal is not thrown out, there must still be some nice problems of interpretation in fixing upon a measure of the value of railroad property. Any method of valuation based upon the capitalization of earnings would be subject to attack alleging reasoning in a circle.

To take only half of the excess earnings, is, of course, a compromise with principle: a sacrifice made rather to insure future energetic management, than to reward judgment in picking an original line which serves a country rich in traffic, or which possesses superior operating conditions, or to reward effort in building up an efficient organization and establishing satisfactory relations with the shipping and traveling public. The mere general obligation to exercise "honest, efficient and economical management" is reinforced by the appeal to self-interest.[1] To bring American railroad service to its present preëminent place has required courage, imagination, skill of the highest order. And the emphasis upon important investments in railroad plant, as "unproductive," indicates the continued presence of a considerable risk element. When the chance of speculative gain, or the gain to be expected when the line is fully used, compensating for the starving time, is removed or limited, it is the responsibility of the regulation policy to substitute reasonable surety of return if investment is to be tempted. This responsibility Congress recognized.

[1] The Commission, commenting upon proposals of equalizing the rate of return on all roads, said: "Such a plan would stifle all incentive to skill, efficiency, economy, and good management." New England Divisions, 62 I. C. C. 513, 365.

§ 7. As a practical tool, the rule of rate making, especially in relation to the recapture of excess earnings, must be incomplete until a figure of "value" has been determined and attached to each road. This is a work upon which the Commission has been engaged since 1913. In the 1920 Increased Rate Case, the Commission was forced to use round figures, frankly tentative, for the totals in each rate group.[1] But, when the final value figures of the Commission have been completed, they, of course, will be used to calculate excess earnings, if any, and to determine the aggregate value of the railroad property in the rate making

[1] Commissioner Hall, testifying before the Senate Committee on Interstate Commerce, "Modification of Transportation Act," Hearings, 67th Cong., 1st Sess., presented at length a statement prepared by Commissioner Aitchison describing the method by which the Commission hit upon the figure $18,900,000,000, used in the 1920 case. This testimony is at p. 676 and following:

"All of the results produced by years of work on the part of the Bureau of Valuation were utilized, both as to particular roads and as to general tendencies and principles. These data covered (a) information as to the original cost of the property, (b) cost of reproduction new, (c) the accrued depreciation, (d) the amount of the investment, (e) the corporate histories of the properties, (f) the values of the lands, and (g) other values and elements of value, if any.

Those were found in the working papers in our Bureau of Valuation, which had accumulated during this period of time.

We utilized the results of the work of the bureau not only in cases where reports from the engineering, land, and accounting sections were all completed, our work being done by sections, but where substantial completion had been reached in the work of any of these divisions. Some idea of the magnitude of this special task of compilation may be had from the fact that 572 employee-days' services were performed in the bureau of valuation in this phase of the work. . . .

A thorough study was made of the results of such inspections as were made under law and as to the corrections of errors which had been made.

That reference to policing the property investment accounts of the carriers might be explained. It has not been practicable with the force at our command to police these accounts of the carriers in the way we should have liked. I am speaking now merely of property investment accounts. These accounts running back prior to 1907 have been thoroughly examined by our bureau of carriers' accounts in only a few instances. We made a most serious and diligent attempt, irrespective of what was urged upon us in argument or in other ways, or presented in evidence,—now, do not misunderstand me; we did not ignore the evidence; we took all the evidence and we considered it; it was our duty to do that, but we had to exercise judgment in weighing this evidence, and we reached conclusions which, after all, represent the composite of a number of minds.

The amount and market value of the bonds and stocks had been developed along general lines in the evidence, but was not especially studied by us.

In the compilation of the statistical matter, 494 clerk-days' labor was performed in the Bureau of Statistics. This is distinct, of course, from the labor that was done in the Bureau of Valuation. In addition, the entire time of Attorney-Examiner Flynn was taken up for more than three months with this work."

groups. The figures of valuation must, therefore, be of basic significance in the task of credit rehabilitation. Because of this fact, an understanding of the principles upon which they are being built up is essential for a clear understanding of the full scope of the regulation of management.

CHAPTER XXIII

RAILROAD VALUATION

§ 1. The rule of rate making is a development from premises clearly established by the carriers themselves. While prominent executives were proclaiming that there existed no relationship between rates and valuation, railroad attorneys were seeking to justify increased rates, not alone by pointing to the public interest in the maintenance of railroad credit, but by insisting upon a "legal right" of the carriers to advance rates in order to secure a fair return on the value of their properties.[1] Earlier, in the Spokane Case, reductions in rates had been fought by the railroads on the ground that to reduce their rates would leave them less than a fair return upon the value of their properties. Figures purporting to measure the value of the Great Northern and Northern Pacific were introduced, and the carriers' engineers

[1] Judge R. S. Lovett, of the Union Pacific R. R. Co., on December 21, 1910, stated before the Railroad Securities Commission:

"It is perfectly obvious that the railroad rates of this country are not based on the value of railroad property. No railroad company has ever undertaken to base rates, on the value of its property, and no railroad man has ever attempted to make rates according to the value of the railroad. . . . Rates must of necessity be the same on all competing railroads; and yet we know that the value of such railroads varies greatly. If the more valuable should raise its rates because of its investment or value it would simply drive the competitive business to the cheaper line. . . . In short, it is just as plain that railroad rates are not and never have been based upon the value of railroad property as that they are not and never have been based upon the stock and bonds outstanding. Nor do I understand that Congress has ever authorized or required the Interstate Commerce Commission to base rates on the value of the railroad property."

But see in Advances in Rates—Western Case 20, I. C. C. 307, 337, a discussion of the Burlington's claim of legal right, given in detail in Chester M. Dawes's brief. Evidence, Proposed Advances in Freight Rates, Sen. Doc. No. 725, 61st Cong., 3d Sess.

testified at length.[1] Some of the claims set up were manifestly absurd, upon the ground that, considering the extent of the issues, the investigations which furnished the figures of value submitted were almost perfunctory, if upon no other.[2] But the Interstate Commerce Commission had no authoritative data by which to measure the adequacy of the carriers' evidence, even upon the premises used. The result was to force the hand of the Commission and of Congress. In 1913 the Valuation Act (Section 19a of the Interstate Commerce Act) was passed in answer to reiterated recommendations by the Commission.[3] Its passing marked the high tide of Mr. LaFollette's influence in the Senate.[4]

The Commission was directed to make a variety of related, though quite separate investigations. A "physical valuation," supplemented by accounting investigation, and not a little historical research, was provided. The purpose was primarily to examine the history and organization of each railroad without emphasis upon the amount of the capitalization. The determination of the existence or non-existence of watered stock was to be one of the by-products of an investigation undertaken because of the rate problem.

[1] Spokane *v.* N. P. Ry. Co., 15 I. C. C. 376. The methods of making their appraisals is disclosed in the Record of the Minnesota Rate Cases, 230 U. S. 352. They are discussed, p. 30 and *passim*, Homer B. Vanderblue, *Railroad Valuation.*

[2] See Homer B. Vanderblue, *Railroad Valuation*, pp. 53, 58, 63, 71, and the Record, Minnesota Rate Cases, 230 U. S. 352.

[3] 23d Annual Report (1909), p. 6; 24th Annual Report (1910), p. 35; 25th Annual Report (1911), p. 94. These recommendations were strengthened by those of the Railroad Securities Commission (Arthur T. Hadley, President of Yale, Chairman), submitted to President Taft late in 1911. This Commission said:

"Indeed we believe it to be in the interest of the railroads, no less than of those who use them, that the Interstate Commerce Commission should be given broad powers and adequate means for valuation of the physical property of railroads as one element in determining fair values, whenever, in the judgment of the Commission, this is of sufficient importance to warrant such action. This will give the public information which it is entitled to demand, and which can, in our judgment, be better and more economically obtained in this way than in any other. The attempt to oppose a system of physical valuation of this kind tends to give countenance to exaggerated estimates of the amount of water in railroad stock." Report of the Railroad Securities Commission, p. 18.

[4] Mr. LaFollette, indeed, led the legislative battle. He said "very frankly" that one aim of the Valuation Act was "to put into the possession of the Commission, and upon record, the data which will enable us ultimately to try out the question and determine the right of railroads to capitalize the unearned increment." 49 Cong. Rec. 3800.

In framing the Valuation Act, Congress had to take into account all probable uses of the figures ultimately to be determined. If these were to stand the tests of the Courts, it was essential that the law be drawn to conform to such principles of railroad valuation as had been voiced in the opinions of the Supreme Court. But these principles, study showed, were vaguely expressed. The governing doctrine, announced by Mr. Justice Harlan in Smyth *v.* Ames, had been followed by his colleagues in a series of cases in which it had not been necessary to test the logical adequacy of the rule. No clear statement of principle could be found. To be sure, the scope of the necessary investigation has been indicated; but only in very general language:

> "the ascertainment of that value is not controlled by artificial rules. It is not a matter of formulas, but there must be a reasonable judgment having its basis in a proper consideration of all relevant facts."[1]

The weight to be given each element of "value" has been held to depend upon no set rule, but upon an appraisal of the facts as demonstrated for the individual company.

§ 2. Few recent statements of judicial doctrine have had the influence of the following words of Mr. Justice Harlan:

> "In order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity . . . under particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property."[2]

Compare now the language of the statute. The Commission is directed to "ascertain and report in detail as to each piece of property owned or used by said common carrier, for its purposes as common carrier, the original cost to date, the cost of reproduction new, the cost of reproduction less depreciation, and an

[1] Minnesota Rate Cases, 230 U. S. 352, 434.

[2] Smyth *v.* Ames, 169 U. S. 466, 546. For a critical discussion of this "rule," an analysis of its origins and discussions of its subsequent development in the opinions of the Supreme Court, see Homer B. Vanderblue, *Railroad Valuation*, pp. 7–19; *Railroad Valuation by the I. C. C.*, p. 89, an analysis of the "regulation-condemnation" analogy.

analysis of the methods by which these several costs are obtained, and the reason for their differences, if any"; in like manner, to "ascertain and report separately other values, and elements of value, if any, of the property of such common carrier, and an analysis of the methods of valuation employed, and of the reasons for any differences between any such value and each of the foregoing cost values." In this language the bill sought to cover "intangible values"—going value, good will value, and franchise value. It is difficult to see wherein, if at all, the Valuation Act set up anything beyond the "requirements" of the "rule" in Smyth *v.* Ames. It perhaps promised a consistent application of any governing hypothesis; but at most that was all.

§ 3. The organization, created to do the valuation work, was placed directly under Mr. Prouty who, as a member of the Commission, had written opinions in cases in which valuation had appeared as an issue, notably the Spokane Case.[1] At first he was assisted by an Advisory Board, composed of a former Minnesota State Commissioner, presumably retained because of his contact with the valuation problem as presented in the Minnesota Rate Cases, and two professional public utility experts, one a former commissioner in New York, the other an economist who frequently had been retained by cities in law suits involving rates set by public authority. The former Minnesota State Commissioner, Mr. Staples, continued with the Bureau as Associate Director. For the others, the appointment was merely temporary.

The country was divided into five districts, each containing approximately 50,000 miles of line. At the headquarters of each district was a member of the Commission's Engineering Board, with a District Engineer, a District Accountant, and an attorney who acted as supervisor of land appraisals and as legal adviser. Each of these section heads was responsible to Washington. As the work on a carrier was completed, the result was forwarded to Washington, where the Valuation Analysts brought the reports on engineering, accounts and land values together into the form of "tentative valuations," served on the carriers. The Director had also as principal assistants, a Supervisor of Accounts, a

[1] The subsequent discussion is largely based upon Homer B. Vanderblue, *Railroad Valuation by the I. C. C.*, pp. 22–52.

Solicitor, and a Supervisor of Land Appraisals. The five members of the Engineering Board constituted the intimate body of technical advisers. At Washington was built up a corps of computers, accountants, lawyers and clerks.

The railroads formed the Presidents' Conference Committee on the Federal Valuation of Railroads, consisting of the presidents of the "Class I" roads. The purpose was to coöperate with the Commission, to standardize practice in engineering and land appraisal work, and especially to insure a full protection of the carriers' legal rights. The most significant work has, therefore, been that of the railroad counsel on whom fell the brunt of the work of directing the preparation of cases before the Commission, when the carriers "excepted" to the tentative valuations served by the Commission. The Railroad Administration, during Federal control, recognized the coöperative nature of the Conference Committee work, meeting all expenses except those of the legal staff, as part of the government operating costs. Legal expenses were met from the carriers' corporate income.

The Commission's report in the first of the reported valuation opinions—Texas Midland Railroad—recounts in considerable detail the scope of the actual work done, both in field and office. The engineering field work was divided between different branches, the basis of division being the specialized skill required for the work of inventory. The road and track party, to which was attached a representative of the carrier as "pilot," measured and inventoried the roadway and all structures over 12 feet long, and buildings. The bridge party, consisting usually of two engineers, one the Commission's engineer, the other, the carrier's representative, measured bridges with over a 12 foot span. The mechanical and buildings parties were of similar membership; the one to deal with equipment, shop tools, machinery and simple electrical installation, the other with buildings, including fuel and water stations. The inventory of the complicated electrical installation was done by the Electrical Branch, and of signal apparatus, by the Signal Branch. The basis of the inventory was provided in the law: the classification of expenditures for road and equipment prescribed in the Commission's accounting regulations. The ideal sought by the Commission was detail "sufficient to enable the one who examines the report to form a fairly accu-

rate judgment of the character and condition of the property."[1] This work was done for over 250,000 miles of railroad, and in spite of the wartime complications was finished in eight years.[2]

But the inventory was only half the story. It was necessary to apply unit prices to the quantities found. It was decided that a "normal or fair price" as of June 30, 1914, should be the basis of calculation. A wide variety of supporting data was sought. The carriers reported the actual prices paid for labor, and for materials and supplies for five years, and in some instances for ten years, prior to the valuation date. These were sometimes verified by the Commission's accountants, and sometimes manufacturers were consulted to determine the prices at which standard materials had been furnished. An average figure was then calculated to furnish "the basis of the price applied by the Commission." The Commission's engineer arrived at the unit prices finally adopted "by some independent process."

It was necessary also to appraise accrued depreciation. In general, the inventory inspection served to set the actual life standard used, when the normal had been departed from. Instructions provided for careful and detailed notes of observations covering the age, wear and tear, maintenance and probable service life of the inventory units. Some short cuts were invoked: concrete and masonry were assigned a normal life of 100 years, timber structures, of 50 years, cast iron culvert pipes, of 80 years, etc. Where renewals had become uniform in quality and quantity, the service condition (i.e., the percentage of cost of reproduction new reported as cost of reproduction less depreciation) was considered as 50 per cent. All locomotives and all passenger cars were ordered inspected, but ordinarily not less than 10 per cent of the freight cars ("and as many more as might be necessary to furnish a fair basis"), to secure a standard of condition to be applied to the entire series. Spikes were depreciated on the same basis as the ties, etc., etc.

The methods used in land valuation were adapted from expedients developed in previous state appraisals. Mr. Prouty, who insisted that he "really organized the system," simply took over the sales method, an examination of records of sales, the sales-

[1] Texas Midland R. R., 1 Val. Rep. 1, 113.
[2] 36th Annual Report I. C. C. (1922), p. 70.

assessment method, a comparison of sales with assessed valuations, and the opinion method, and provided a coördinating and determining factor—the independent judgment of a civil service appointee, salary $2,400 to $3,000 a year.

The information on corporate history called for by the Act was compiled by the accountants. These sought to build up a complete picture of the corporate growth of the system from the beginning down to the date of valuation. It proved no easy task to trace for each corporation, what property was constructed by it, and what became of the corporation itself. In the Boston & Maine system, for example, which comprises less than 2,500 miles, are involved 167 corporate histories. The means resorted to by the carrier for the providing of its funds, the amounts paid in the way of discounts, and, indeed, everything connected with the financial history were shown as fully as possible. It was believed that the facts thus developed would be of great significance in exhibiting what the Commission might term the "financial equities" of each case.

§ 4. It was soon apparent that the largest place in the Commission's investigation was to be occupied by the cost of reproduction appraisal. To get really significant figures of original cost, except for isolated pieces of property, or recent installations or extensions, was found quite impossible. The limitations on accounting research of this character were such as to render much of the work devoid of useful results; records were gone, or property had been destroyed and replaced. Even where the records were intact, the vouchers could not be identified. Mr. Prouty early announced that the work expended on calculating a figure of "cost to date" for the roads used as experimental laboratories (the Texas Midland and New Orleans, Texas & Mexico) had been "absolutely thrown away." He even expressed the hope that the Commission would relieve the accounting office of the Valuation Bureau of further attempt to secure "cost to date."[1] Though this was not formally done, the valuation reports of the Commission indicate that the task of building up new investment accounts was abandoned, and a statement drawn from the books of the carrier, and presented with guarded qualification, substituted.

[1] National Asso. of Ry. Commrs., Proceedings, 26th Annual Meeting (1914), p. 137 and following.

Cost of reproduction figures, on the other hand, because built up wholly anew, could be presented with convincing array of detail.

The great criticism to be brought against a cost of reproduction appraisal is based upon its entire artificiality. This artificiality is readily apparent when the hypothesis upon which the Commission's engineers operated is explained. For simplicity it was assumed that the credit of all roads would be equally good, that a charter would be sought, finances raised, and a building program carried out. Though imaginary engineering parties must be organized and placed in the field, the engineer, instead of running preliminary surveys—indulging in "supposititious groping around the country"—walks to the exact spot where the road exists, and there stumbles upon a long stretch of land the exact width of the present right of way. Even his construction program is not governed by the history of the road; if a swamp has been drained or a watercourse diverted, the original problems are gone; materials come from the most available sources, though, if those nearby have been exhausted, they might be assumed, "for reproduction purposes," to have been put back. Though actual construction began at the east end, he may begin at the west; though actual construction required four years, he may "finish" in three. His problem is further simplified by the fact that he has at his command, all existing means of transportation (except the road he is reproducing) whether or not the competing or connecting lines were in existence when the road was built. How considerate of the St. Paul to have paralleled the Northern Pacific! The Northern Pacific, extended as a pioneer, carried materials over its completed portion to the end of track. Now that the St. Paul is built, imaginary men and materials can be delivered at many points along the line. Even the accident of ownership becomes important; the end-to-end connection which has preserved its identity can receive materials at a junction point which would not be assumed to exist if the lines had been merged. These are but some of the factors reducing the total construction period; an important consideration for the calculation of "interest during construction." All in all, cost of reproduction calls for a pretty exercise of the imagination. Yet, since it expresses its results in dollars and cents, it is likely to give results of consuming but specious accuracy.

§ 5. The Valuation Act provided special treatment for railroad land. The reproduction concept was not entirely abandoned, however, for the Act, as originally passed, directed the Commission to report for land both the original cost and present value of the carrier lands, and, in addition, the present cost of condemnation and damages of purchase in excess of the original cost or present value. To measure the present value of land the Commissions ascertained the acreage owned or used by the carrier, and multiplied this acreage by the market value of similar and adjoining lands.

These "present value" figures are, in fact, based upon a conscious attempt to apply language from Mr. Justice Hughes's opinion in the Minnesota Rate Cases:

> "Assuming that the company is entitled to a reasonable share in the general prosperity of the communities which it serves, and thus to attribute to its property an increase in value, still the increase so allowed . . . cannot properly extend beyond the fair average of the normal market value of land in the vicinity having a similar character."[1]

If logical consistency alone be consulted, these words, like the words of Mr. Justice Harlan in Smyth *v.* Ames, certainly do not justify the importance attached to them by the Commission. It is doubtless true that, for a determination of the value of land used for the same purpose, the value of land of similar character is good evidence, in court and out, of the value of land near by, but not good evidence of the value of land used for a different purpose. To measure the value of railroad right of way by the value of nearby land for residence, trading or farm purposes is quite as absurd as to measure the value of the site of No. 1 Wall Street by the value of burial plots in Trinity Churchyard, across Broadway.

But the words of Mr. Justice Hughes have been given an authority by the Commission to which they are not entitled. They are too ambiguous and uncertain to be deserving of a large place in an issue of large implications of public policy. Nothing was decided affirmatively or explicitly. Even the conclusion is qualified by an assumption, neither approved nor disapproved. Be that as it may, however, the fact remains that figures based upon the adjacent land test constitute the "present value" of

[1] 230 U. S. 352, 455.

railroad lands as reported by the Bureau of Valuation and made "final" by the Interstate Commerce Commission.

Originally the Commission reported no figures of the cost of "reacquiring" the railroad terminal properties and right of way. The Bureau cited as authority for this omission Mr. Justice Hughes's opinion in the Minnesota Rate Case, which was handed down subsequent to the passage of the Valuation Act, but without reference to its provisions:

> "The conditions of ownership of the property and the amounts which would have to be paid in acquiring the right of way, supposing the railroad to be removed, are wholly beyond reach of any process of rational determination. The cost of reproduction method . . . does not justify the acceptance of results which depend upon mere conjecture."[1]

The Commission, although making a cost of reproduction estimate, felt the clear duty to abstain from reporting as an "ascertained fact," what its Bureau of Valuation insisted was impossible of ascertainment. The present value, but not the present cost of reacquiring the land, was therefore reported.[2] Upon the purely technical grounds that the Commission must obey the order of Congress, the Supreme Court directed that the Commission proceed with an estimate of the cost of reacquiring the carrier lands as the statute directed.[3] This work was interrupted in 1922 by the passage of an amendment to the Act which relieved the Commission from the task.[4]

The carriers' legal victory was not, however, completely nullified. As a result of the Supreme Court opinion, the Commission's land department completed some "cost of reacquiring" estimates, based upon a multiple of "naked" land value—thus achieving that which, it had been insisted, was impossible of achievement. If evidence of "cost of reacquiring" is an essential element of fact necessary to sustain a figure of final value either in a rate-confiscation, or in a recapture of excess earnings case (and only an opinion of the Supreme Court can settle this point), the railroads are now in position to attack, as inadequate, the value findings of the Commission, and, to refute the contention that

[1] Minnesota Rate Cases, 230 U. S. 352, 452.
[2] Texas Midland Valuation, 1 Val. Rep. 1.
[3] U. S. *ex rel.* Kansas City Southern Ry. Co. *v.* I. C. C., 252 U. S. 178.
[4] 36th Annual Report I. C. C. (1922), p. 73.

such figures are impossible of ascertainment by introducing the Commission's own figures for nearly 250 "Valuation Dockets."

Curiously enough, the basic objection which the Commission brought against the requirement that it determine the cost of repurchasing the carrier lands can, with equal force, be brought against the adjacent land test which it used to measure the present value of land. Opinion and conjecture have been perhaps the largest sources of information. This is especially true when attempt has been made to apply the Commission formula to land peculiarly adapted for railroad purposes: the narrow river bank or the mountain pass. Usually, except for roads or railroads, these sites are quite valueless. Everywhere the railroad seeks the line of least physical resistance, provided traffic can be developed.

Always the railroad must conform to construction standards imposed by operating requirements. If necessary, it will bid high for land which offers these advantages. This is a first principle of the economics of railroad location. It accounts for the presence of the New York Central along the Hudson and the Mohawk, and for the paralleling of the old Braddock Road, and the early stages of the old National Road, by the Pittsburgh line of the Baltimore & Ohio. The Overland Limited traces the route of the Overland trail, paralleling the Platte River, just as the Santa Fé traces the old Santa Fé trail, paralleling the Arkansas, and climbing the mountains at Raton. It was not accidental that the pioneer roads followed the trails and crossed the divides at low points, nor that the railroad paralleled the wagon road. It is not accidental that, in the older sections, an abandoned canal is frequently seen from a car window. The canals, even more than the railroads, were limited by physical conditions. The old network of the Ohio and Pennsylvania canal system is nearly everywhere paralleled by highways and railroad track. The Baltimore & Ohio fought a bitter legislative battle with the Chesapeake & Ohio Canal for the narrow gap near Harper's Ferry. In a later day, the Santa Fé and Rio Grande were to use armed forces during their struggle for a similar piece of natural engineering—the Royal Gorge—in the rush to reach Leadville. These struggles were not mere tests of power, although their sensational features perhaps served to hide the real basis of the competitive effort. The real motive (beyond the desire to preëmpt territory—a basic

motive, of course) was the desire to secure a location which would save construction costs. It is the easier slope and the natural "cut" which, therefore, frequently renders land valuable for railroad location which is, for any other purpose, substantially valueless. If one may use the extreme case to point the logic of the situation, the Royal Gorge, one of the valuable railroad sites in the West, is, if measured by the adjacent land test, quite worthless.

§ 6. At first the Commission, not without vigorous protest from Commissioner Daniels, found that no "other values, or elements of value" existed. And, in subsequent decisions, this holding was modified to read that no other values or elements of value had been found to which specific sums could be ascribed. The carriers had proposed a subtraction program. Let the value of the property as a whole be determined; and then subtract the "physical value," whatever that may be, the remainder constituting the value of the "intangibles." In considering the logical adequacy of this proposed rule, the purpose of the valuation must be kept in mind. It is to measure the fairness of the return to the enterprise. But value is not intrinsic, and how much the investment market will pay for the shares and bonds of a railroad depends upon the earnings shown. It is in the investment market that the process of the capitalization of earnings takes place. To test rates by the value of the property before the act of regulation is effective means the abandonment of control over a possibly extortionate level of rates. And to test them by the value of the property under earnings of new and lower rates places the carrier arbitrarily under the control of the regulating authority. The whole purpose of the appraisal is to step out of this vicious circle, to determine the level of rates from a standard quite free from the influence of earnings. To interpose the objection that value, as used by the economist and business man, is an exchange relationship, is really quite pointless. What is sought as the basis of the measurement of the reasonableness of the general level of rates is not value in this sense; but value in the special sense of "invested value"—the amount on which the railroad should be allowed to earn a fair return, whatever that may be.[1]

[1] In Galveston Electric Co. *v.* Galveston, 42 Sup. Ct. Rep. 351, an opinion delivered by Mr. Justice Brandeis, April 10, 1922, the phrases "rate base" and "base value" are used. It would seem that the Court once for all disposed of the contention that "past deficits" should be capitalized. "A

§ 7. The figure of final value must therefore be built up so that it is free from the taint of dependence upon earnings. This standard the Interstate Commerce Commission has undoubtedly sought to recognize, although the exact process by which it has attained its results is hidden under generality. So insistent have the carriers been that the determination of value is not a matter of formula, but demands independent exercise of judgment, that the Commission has been taught to be wary. It reports a total figure together with all the substantiating evidence, but does not indicate the exact weight assigned to any one element. The figure is an expert guess—no more, no less. Such analysis of the figures as can be made indicates that the final value as reported for most roads is the sum of the cost of reproduction less depreciation, as reported by the Commission's engineers, plus the "present value" of the carrier lands as determined by the adjacent land test, plus 5 per cent of this total then carried to the next lower or higher round figure (usually the latter) plus an allowance for working capital,—cash, materials and supplies. No allowance for intangibles, as such, appears, and there has been no apparent allowance made for any excess "cost of reacquiring" the carrier lands,—the general statement of the Commission notwithstanding, unless the bulk 5 per cent may be accepted as such.[1]

company which has failed to secure from year to year sufficient earnings to keep the investment unimpaired and to pay a fair return, whether its failure was the result of imprudence in engaging in the enterprise, or of errors in management, or of the omission to exact proper prices for its output, cannot erect out of past deficits, a legal basis for holding confiscatory for the future, rates which would, on the basis of present reproduction value, otherwise be compensatory." For the economic argument substantiating this conclusion, see Homer B. Vanderblue, *Railroad Valuation*, pp. 166-177.

[1] Thus in the Los Angeles & Salt Lake Case, the Commission said:

"After careful consideration of all the facts, tentative and supplemental tentative, valuations, including the excess cost of carrier lands, appreciation, depreciation, going concern value, working capital, and materials and supplies, and all other matters which appear to have a bearing upon the value here reported, the value, as that term is used in the Interstate Commerce Act, of the property of the above-named carriers, owned and used but not owned, devoted by the carrier to common-carrier purposes, is found to be $45,871,093. There is included in the figure named as final value, the value of certain lands used by the carrier for common-carrier purposes but owned by parties other than a common carrier, the present value of which is $38,774.78. There is also included in the value above stated the sum of $2,221,093 on account of working capital and materials and supplies." Tentative Valuation, S.P. L. A. & S. L. R. R. Co., Aug. 2, 1919.

There are some exceptions to the application of the 5 per cent short cut, but these have been quite exceptional, and most important because showing that the Commission has, after all, been resorting to expediency. For the Elgin, Joliet & Eastern and its affiliated companies the percentage allowance was apparently 7½ per cent, the figure also for the Mobile & Ohio:

Railroad	*Cost of Reproduction less Depreciation plus Present Value of Land Plus 5 per cent*	*Cost of Reproduction less Depreciation plus Present Value of Land Plus 7½ per cent*	*"Final Value" less Cash, Materials, and Supplies*
Elgin, Joliet & Eastern	$13,673,628	$13,999,188	$14,000,000
Chicago, Lake Shore & Eastern	18,796,215	19,345,904	19,250,000
Joliet & Blue Island	380,930	389,999	400,000
Mobile & Ohio	41,071,886	42,049,786	42,000,000

For the Rock Island a curious situation appears. There, for the parent company, the percentage allowance is 2½ per cent, although on the subsidiaries the full 5 per cent is allowed. The figure of final value, less cash, materials, supplies, etc., has been fixed at $243,000,000, whereas the 102½ per cent figure is $242,837,659. Undoubtedly the real explanation for the shrinking of the percentage allowance from 5 per cent to 2½ per cent is the fact that a 2½ per cent allowance proved sufficient to "clear" the carrier investment account; which, on valuation date, was carried on the books as $235,867,015.[1] The application of the 5 per cent formula to the subsidiaries is apparent from the following figures:

Railroad	*Cost of Reproduction less Depreciation plus Present Value of Land Plus 5 per cent*	*"Final Value" less Cash, Materials, and Supplies*
Keokuk & Des Moines	$3,455,183	$3,464,958
Choctaw, Oklahoma & Gulf	35,612,396	35,500,000
Rock Island, Arkansas & Louisiana	10,747,985	10,750,000
St. Paul & Kansas City Short Line	8,404,285	8,400,000
C. R.I. & Gulf	12,979,186	13,000,000
Peoria & Bureau Valley	1,641,120	1,650,000

Surely these close approximations are not to be accounted for solely as mere coincidences.

[1] Consolidation of Railroads, 63 I. C. C. 455, 644.

The figures are, indeed, typical of those fixed for almost all companies for which figures of "fixed value" have been published. The figures for the larger companies are given below, but for the smaller companies the figures show similar calculations. There can hardly be doubt concerning the method by which substantially all the figures have been built up.

Valuation Docket No.	*Railroad*	*Cost of Reproduction less Depreciation plus Present Value of Land Plus 5 per cent*	*"Final Value" less Cash Materials and Supplies*
4	Kansas City Southern	$26,879,893	$28,763,625
17	Georgia Southern & Florida	9,367,610	9,500,000
31	Norfolk Southern	21,172,360	21,220,000
41	Chicago, Terre Haute & S. E.	19,507,501	19,919,076
73	Spokane International	4,724,948	4,750,000
132	St. Louis S. W. of Texas	22,825,504	22,850,000
142	St. Louis S. W.	25,286,248	25,550,000
144	Green Bay & Western	4,766,870	4,900,000
150	Bangor & Aroostook	20,741,043	20,658,484
151	Florida East Coast	45,128,339	45,500,000
159	New York, Philadelphia & Norfolk	10,432,022	10,500,000
164	Charleston & Western Carolina...	9,807,930	9,800,000
168	Chicago, Indianapolis & Louisville	26,581,190	26,750,000
192	New York, Ontario & Western	31,986,446	32,500,000
202	Chicago & Eastern Illinois	62,057,847	62,250,000
207	Maine Central	39,923,700	40,000,000
209	Arizona Eastern	9,375,537	9,400,000
221	Boston & Maine	92,991,822	92,500,000
	Boston & Lowell	26,679,284	26,500,000

Some of the deviations from the 5 per cent rule apparently are due to a desire to "cover" underlying security issues. Thus the 5 per cent rule, which would give $15,414,209 for the Toledo, St. Louis & Western, is deviated from by fixing a figure (less cash, supplies, and materials) of $16,250,000. Quite conceivably the figure was stretched because of the existence of underlying bond issues of which bonds to an amount of $16,075,000 were outstanding as of December 31, 1919. It is possible also that the figures for the Louisiana Railway & Navigation Co. (which, on the 5 per cent formula would make $9,737,052) were stretched to $10,500,000 on the same account—the underlying bond issue being $10,361,000. But for the great number of "valuations" the

straight 5 per cent formula has been used in the calculation of the base figure of "final value."[1]

To attack the figure of final value as thus determined as unscientific and inconclusive is easy. Undoubtedly it is true that much unwarranted weight will be given to figures which, as figures, deserve no special credence. Railroad apologists hurried to proclaim that the figures show that talk of watered stock has been much exaggerated. Counsel for the organized railway employees, Mr. Plumb, on the other hand, used the figures to discredit the $18,900,000 tentative figures fixed in the 1920 Increased Rate Case.[2] The truth of the matter is that, taken alone, the figures *prove* nothing at all.

After all, the importance of the valuation must rest upon the future use of the figures, rather than upon their statistical adequacy anyway. Some sort of figure must be got together on a reasonably comparable basis if the Transportation Act is to be made to work, as Congress has intended it shall. The valuation figures are mere tools—the means to an end. Had they been sought as ends in themselves, the absurdity of the hypothesis and the uncertain process of their determination would destroy their acceptability. But the figures have not been sought as ends in themselves, but as rough measures of the amounts upon which the public is willing to pay a fair rate of return, as established by the Commission. The truth of the matter is that a figure of value in the usual sense of the word is not wanted at all; but a figure which can fairly be used to apportion earnings to railroad investors, a figure which promises to reassure investors and so to assist in the rehabilitation of railroad credit. Whatever may have been the original purpose of the Valuation Act, the rule of rate making established the valuation on this basis.

§ 8. But it is one thing to say that the value figures set by the Commission can be accepted as new starting places for building up bases for measuring earnings, and quite another to say that periodic revaluations based upon the same hypotheses should

[1] The complete figures for the first 153 valuation dockets from which detailed figures similar to those contained in the text may be worked up, are contained in Plumb Exhibits 1 and 1-A, Hearings, House Committee, on Interstate and Foreign Commerce, 67th Cong., 2d Ses., *Railroad Valuations*, pp. 84 and 86.

[2] *Ibid.*, p. 20; and the reply testimony of Mr. W. G. Brantley, attorney for the Presidents' Conference Committee, p. 123.

be made in the future. The value figures as reported may be accepted in default of better figures, but should be accepted upon no other ground. They bear no necessary relationship to investment. What will be the future attitude of the Supreme Court, in the event the Interstate Commerce Commission seeks to lower rates, and confiscation becomes an issue, or in recapture of excess earning cases, it is quite impossible to say. Will there be insistence upon a new valuation, taking into account further increases in the value of adjacent land? And are the cost of reproduction figures based upon prices of June 30, 1914, always to govern? These are two of the many vital questions which can be answered only by the future. The present purpose of the valuation is gained if the figures serve as a basis for a level of earnings which will tempt further investment in railroad facilities. So far as the general rate level is concerned confiscation is hardly likely to be an issue in the near future. But individual roads, hit by the recapture clause, will undoubtedly appeal to the courts. Then it is quite possible that the courts may insist upon the development of new basic data as well as the fixing of a new figure of value. Such action on the part of a court would be likely only when the Commission's action appeared arbitrary or transcended "the legitimate bounds of its authority."[1] Possibly the demonstrated failure to take into account the cost of reacquiring carrier land in fixing the figure of final value may constitute the basis for overruling the Commission.[2] Future litigation alone can determine that issue.

It must be recognized, however, that keeping the valuations up to date is a duty assigned to the Commission. With it rests the responsibility of keeping informed of all extensions and improvement or other changes in the condition and value of the property.

[1] In Seaboard Air Line Ry. Co. *v.* U. S., 254 U. S. 57, it was held that the findings of fact by the Interstate Commerce Commission upon questions, the determination of which is by law imposed upon the Commission, as is the fixing of final value, can be disturbed by judicial decree only in cases where the Commission's action is arbitrary, or transcends the legitimate bounds of its authority.

[2] Undoubtedly the carriers, building upon Ohio Valley Water Co. *v.* Ben Avon Borough, 253 U. S. 287, will ask the revision of the Commission's figure of value, because of the failure of the law as amended in 1922, to require the determination of the costs of reacquiring carrier lands, and because of the ready demonstration from the figures that, the vague statement to the contrary notwithstanding, no real allowance seems to have been made for this "element" of value.

The contemplation is undoubtedly that the future valuations will in fact be the sum of the "final value" and amounts which are, under accounting rules, properly added to capital account. This is the tone of the 1922 Reduced Rate decision. Such totals will really be heterogeneous totals—but the whole valuation, let it again be emphasized, is to be judged, not by standards of statistical accuracy, but by results. A rapt attention to a demonstration of the inconsistencies of the Valuation Act is liable to leave the critic in the position of those, who, in the Sixteenth Century, demonstrated the flatness of the earth while adventurous spirits were actually sailing toward the West to reach the East.

CHAPTER XXIV

THE PROTECTION OF INVESTORS

§ 1. Regulation which seeks to limit railroad earnings, and so to control private management at the source, must offer, instead of speculative gains which attracted investors in the pioneer days, surety of return and the protection of the investment. If surety can be provided with reasonable certainty, investment can be attracted into the railroad field upon a lower basis of return than otherwise possible. It was the absence of such surety that made so difficult the floating of railroad securities upon a "satisfactory basis," during the years following 1910. It must be frankly recognized that the settling down of the railroad lines into their present form, and the urgent need for intensive improvement, rather than extensive building, has ended the present possibility of securing funds by speculative appeal. The rule of rate making and the recapture of earnings clause promise to limit such possibility for all time, and even the ten-year suspension of the recapture clause in the case of a newly built railroad or extension does not lighten the burden.[1] Most new railroads go through a ten-year starvation time, anyway. It was the extraor-

[1] Certificate to Union Pacific R. R. Co., 65 I. C. C. 382, 384; Public Convenience Certificate to C. of Ga. Ry. Co., 70 I. C. C. 839; Public Convenience Certificate to Oklahoma & Arkansas Ry. Co., 70 I. C. C. 448. In Finance Docket No. 2334, decided May 10, 1922, in which the application for a certificate of public convenience and necessity of the Georgia, Ashburn, Sylvester & Camilla Railway, organized to take over a part of the Hawkinsville & Florida Southern, was considered, an application to retain the excess earnings, if any, was denied, because, the line having been in existence for a number of years prior to the effective date of the 1920 Act, the Commission found itself without jurisdiction. Public Convenience Certificate to G. A. S. & C. Ry., 71 I. C. C. 616.

dinary gains to be expected thereafter that attracted the funds to throw railroads across the continent. The present problem is to place safeguards around the railroad business, so that—short of government guarantee—the investor may have confidence in safety of principal and surety of income.

The protection of the railroad income, which is the basis of railroad credit, must be a first object of attention. Gross revenues may be depleted, quite aside from any action of the management of an individual railroad, (1) by the building of a competing line, (2) by reckless rate cutting by competitors or state authorities, and (3) by the exaction of inequitable divisions by a connecting line. The Transportation Act recognized the fairness of the claim that these elements should be minimized if the rate of return is to be limited, and excess earnings recaptured.

§ 2. Since it is the purpose of the Transportation Act to provide rates which will yield a fair return on railroad property in groups, any increase in the number of weak lines, which under no conceivable basis of competitive rates could earn a reasonable return, would increase the burden which the public would have to bear in the way of rate levels. The problem of the "weak lines" was given special recognition when Congress provided that in the future no carrier subject to the Act should undertake the extension of its line of railroad, or the construction of a new line of railroad unless it had first secured a "certificate of public convenience and necessity." The public was further safeguarded against the evasion of this protection by the construction of new lines of railroad, not presently to engage in interstate commerce, and therefore not subject to the Interstate Commerce Act. As to these it is provided that they may not engage in interstate transportation by means of an additional or extended line of railroad, nor by means of an existing line which may have been devoted to purely intrastate commerce, until they too shall have secured a certificate of public convenience and necessity. The Interstate Commerce Commission is thus fully empowered to protect the public against the evil effects of the construction of new lines of railroad for which the public has little need.[1]

The Commission has interpreted its responsibility broadly. It has sought to protect not only investors in a proposed railroad

[1] See above, Chapter XX, p. 294.

enterprise, but those who might make investment in homes and business establishments along the line. For them, abandonment of operations might well entail greater loss than to those investing directly in the enterprise.[1] It has considered the fact that the competitive traffic expected to accrue to the applicant would not prove unduly detrimental to other carriers.[2] When serious doubt of the probable business success of the project has been apparent, the certificate has been denied; [3] but, in the case of a proposed Union Pacific branch into a newly opened irrigation project, the Commission, in order to justify granting the certificate, took into account the fact that the extension would ultimately be developed as part of a through line with heavy traffic. On purely local business even the figures of the railroad showed promise of a return of barely 1.3 per cent for the first five years and 3.5 per cent thereafter, figures which—"the apparent convenience and benefit to the surrounding territory notwithstanding"—could not justify construction of the proposed line either as an independent short line or purely as a branch.[4] The pro-

[1] Construction Application, Michigan Northern R. R., 65 I. C. C. 480, 485.

[2] Restoration of Service by Wisconsin & Michigan, 65 I. C. C. 476, 477.

[3] Construction Application, Michigan Northern R. R., 65 I. C. C. 480, 485. See, however, Public Convenience Certificate to the Jackson & Eastern Ry. Co., where the Commission, in the face of a record which "as a whole" failed to afford reasonable assurance that the project would become a permanently successful enterprise, granted the certificate requested:

> "However since local interests are ready and willing to assume the burden with full knowledge of what the future may hold for the enterprise, it seems proper that they should be permitted to do so." 70 I. C. C. 110.

In passing upon the issue of a certificate for the Idaho Central R. R. Co., Public Convenience Certificate, Idaho Central R. R., 70 I. C. C. 265, the Commission in the face of a vague record, upon which comment is made in the report in terms of "no definite information," "matter of speculation," "no definite estimate," "no detail furnished," etc., granted the certificate:

"The State Commissions have submitted their joint recommendations that the application be granted. Their intimate knowledge of the region and its needs entitled such recommendation to great weight. All things considered we are of the opinion that the proposed line will supply a definite need for transportation facilities. There is some doubt, however, as to the earning power of the proposed road. Such doubt arises chiefly from the absence of definite estimates of probable traffic. In view of this uncertainty, we think the applicant must be limited in its financing to methods other than the issuance of bonds, at least until experience shall have demonstrated the earning power of the line."

[4] Certificate to Union Pacific R. R., 65 I. C. C. 382, 383. The cost of the proposed 43.5 mile construction was to be nearly $4,000,000, indicative

vision that no independently built extension can be acquired or taken over for operation by a railroad without a certificate of necessity should also go a long way towards preventing the building of "independent" branches or extensions for unloading on a main line. The new clause does not protect fools from the effects of their gullibility; but it should protect innocent holders from being sold out by an unscrupulous clique with the effect of discrediting railroad management generally. The Interstate Commerce Commission has on occasion apparently felt that such has taken place.

Insurance against a wholesale depreciation of values through destructive rate wars the investor had, before the Transportation Act was passed, through the rate suspension power by which the Commission had asserted the power to suspend reductions in rates to prevent unjust discrimination. The Transportation Act, by granting the power to fix minimum rates certainly completed the control already asserted.[1] The new act also sought to prevent nullification of the constructive efforts of the Interstate Commerce Commission by individual state legislatures or commissions lowering rates, or maintaining lower rates on intrastate traffic than those maintained on interstate traffic. The rule of rate making takes no account of state lines, and its purpose would be defeated if the state legislatures and commissions should repeat their tactics of the first decade of the century when maximum freight rates and two cent fares were established within the states. Instead of there being excess earnings on the strong roads, there might be a cutting down of the level for the benefit of the citizens of a single state.[2]

of the fact that the construction was of a character to permit heavy traffic, when the tie-up was made with the main line.

The report granting the application of the Oklahoma & Arkansas Ry. Co., Public Convenience Certificate, Okla. & Ark. Ry., 70 I. C. C. 448, recognized that it was doubtful if the road could be profitable after lumbering operations opened up by the construction had ceased, but, in view of the necessity of the railroad for lumbering operations, granted the application.

A case in which the applying railroad made a clear case is Construction Application, Chicago & Alton R. R. Co., 72 I. C. C. 1; a case in which permission was denied: Public Convenience Application, Wichita & Northwestern R. R. Co., 71 I. C. C. 42.

[1] See Coal from D. T. & I. Mines, 64 I. C. C. 564, and the cases there cited.

[2] Rates, Fares & Charges, N. Y. C. R. R. Co., 59 I. C. C. 290; Intrastate Rates within Illinois, 59 I. C. C. 350.

The result of the Shreveport Case had been to establish clearly the principle that intrastate rates, though established by state authority, must not discriminate unduly against business men engaged in interstate commerce. The removal of such discriminations had been effected by establishing scales of rates which, recognizing the distance principle, sought to equalize opportunities on competitive business.[1] But the Supreme Court subsequently restricted the operation of this rule to clear cases of competition between individuals and localities,[2] a competition not always demonstrable through all parts of a rate structure. The new rule held that in each case the Commission's order must have a definite field of operation, and not leave uncertain the territory or points to which it applied. In 1920, however, the concern was with rate levels, and therefore with rate structures as a whole. The gross intrastate revenue is about twenty-five per cent of the total carrier income. If the intrastate rates should be fixed on a substantially lower level than the interstate rates, the share of gross earnings contributed would be proportionately less. It would be the duty of the Commission, under the responsibility imposed by the rule of rate making, to provide against this "deficit," if such appeared. This might well mean a further advance in the level of interstate rates; or, if such seemed bad business because, by advancing interstate rates above what the traffic would bear, more business would be driven to intrastate commerce, it might mean the earning of less than the return contemplated by the Transportation Act. To remove this element of risk or uncertainty from the calculations of possible investors, the Commission was given the direct power to remove "any undue, unreasonable or unjust discrimination against interstate or foreign commerce."

§ 3. In the Wisconsin Rate Case, the test case which went to the Supreme Court, the Commission found that the fare necessary to fulfill the requirement as to net income under the rule of rate making, 3.6 cents per mile (20 per cent over the 3 cent fare fixed

[1] R. R. Com. of La. *v.* A. H. T. Ry. Co., 48 I. C. C. 312, and preceding cases: 23 I. C. C. 31; 34 I. C. C. 472; 41 I. C. C. 83; 43 I. C. C. 45; Carroll, Brough & Robinson *v.* A. T. & S. F. Ry. Co., 31 I. C. C. 466; Missouri River-Nebraska Cases, 40 I. C. C. 201.

[2] American Express Co. *v.* Caldwell, 244 U. S. 617; I. C. R. R. Co. *v.* P. U. Com. of Ill., 245 U. S. 493.

by the President during Federal control), was reasonable, and that a continuation of the 3 cent fare would entail an annual revenue loss of $2,400,000 to the Wisconsin carriers, or of $6,000,000 if the State 2 cent fare law should again become effective. The lower basis of rate (the 3 cent fare was effective on state travel, the 3.6 cent fare on interstate travel) was found to create undue, unreasonable and unjust discrimination against persons traveling in interstate commerce, and against interstate commerce as a whole. The Interstate Commerce Commission required the carriers to raise the state rates to the interstate level.[1] The opinion of the Supreme Court upheld the Commission:

> "Congress in its control of its interstate commerce system is seeking in the Transportation Act to make the system adequate to the needs of the country by securing for it a reasonable compensatory return for all the work it does. The States are seeking to use that same system for intrastate traffic. That entails large duties and expenditures on the interstate commerce system which may burden it unless compensation is received for the intrastate business reasonably proportionate to that for the interstate business. Congress as the dominant controller of interstate commerce may, therefore, restrain undue limitation of the earning power of the interstate commerce system in doing state work."[2]

To the extent, therefore, that control of rates by the various state commissions caused investors to hesitate because their incomes might be arbitrarily changed by bodies with conflicting theories or ideals, the Transportation Act offers a protection which should encourage confidence.

§ 4. The new Act recognized that divisions of joint rates because of their relation to the income conditions of particular carriers, became affected with a public interest, and were no longer mere matters of bargain and trade between carriers. Until 1918, the contracts for the division of joint rates, except when the Commission established joint rates, had been recognized as the proper subject of bargaining between the parties. The Commission's concern was then with the rate and charges, not with the disposition of the proceeds. During the early years of its activity, the Commission repeatedly asserted that the amount of divisions of joint rates was of no interest whatever to the shipper, and was a proper matter for bargaining between the individual

[1] Wisconsin Passenger Fares, 59 I. C. C. 391.
[2] R. R. Com. of Wis. *v.* C. B. & Q. R. R. Co., 257 U. S. 563.

companies without restraint, except where the Commission itself prescribed joint rates and the carriers failed to agree upon their division. In 1918, however, the Commission announced the principle that it possessed the power, upon the complaint of any carrier party to a joint rate, to prescribe what would be an equitable division, even though the joint rate established, had resulted entirely from the voluntary action of the carriers.[1] The legality of this holding under the old law was questioned by the carriers, but was not decided by the courts because it became moot through the provisions of the Transportation Act, 1920.

Under the original law it had often been contended that a "weak line" was being unconscionably "squeezed" in the matter of divisions by threats of diversion of traffic. Such a line was often dependent for through traffic upon connections reaching several gateways, and a weak line which needed traffic at almost any price, would sometimes accept "competitive" divisions. The railroad with traffic which it could, at its option, deliver to any one of several connections, had a strategic advantage in enforcing demands for large divisions. Railroad competition has been a cut-throat game.

Not a little of the building of competing railroads to strategic points of interchange, or the acquiring of existing lines, has been due to an effort to entrench or to overcome an existing disadvantage in negotiating for divisions.[2] Because the Atlantic Coast

[1] The decision in which this power had been asserted, a five to four decision of the Commission, reversed a previous opinion: Morgantown & Kingwood Divisions, 49 I. C. C. 540, reversing 40 I. C. C. 509.

[2] The value of the Monon to the Southern lines, of the N. Y., O. & W. to the New Haven, of the Illinois Central from Omaha to the Union Pacific, in negotiations of this character is quite clear.

There was sound business sense, not mere perversity, in the attempt of the Lehigh Valley to hold the boat line which constituted its system Chicago connection. Such a line as the Lehigh Valley could well find itself bottled up in Buffalo by a combination of Western connections. Possession of the lake line meant participation in the naming of through rates, and gave a club to insure that its divisions would be fairly adjusted.

The situation of the Grand Trunk, ultimately permitted to continue ownership of the Canada Atlantic Line, operating in connection with the railroad at Depot Harbor, Georgian Bay, was far more secure; it possessed all rail connection with Chicago. Lake Line Applications, 33 I. C. C. 699, 708; 37 I. C. C. 77; Lehigh Valley R. R. *v.* U. S., 243 U. S. 412; Application of Grand Trunk Co., 43 I. C. C. 286.

The Lehigh Valley in denying the "familiar and oft-repeated charge" that it bought control of the Morris Canal to stifle competition, explains the lease in the following language: "In 1871, the rails of the Lehigh Valley, then as now an important anthracite carrier, terminated at Easton,

Line took what was thought to be a disproportionate share of the rates for the haul between Waycross and Jacksonville, the Atlanta, Birmingham & Atlantic planned to build its own line, until the war postponed the building.[1] The successor company to the Wabash-Pittsburgh Terminal, the Pittsburgh & West Virginia, found it necessary to appeal to the Commission in order to overcome its strategic disadvantages in bargaining with the Pittsburgh & Lake Erie.[2] Part of the inheritance from the days of the Frisco control of the Chicago & Eastern Illinois was a scheme of rate divisions whereby larger proportions of joint rates accrued to the Frisco than the C. & E. I. management felt equitable.[3] The dispute was finally readjusted to the satisfaction of the latter, —but not until threats of diversion and closing of the route had made a settlement "out of court" impossible.

The requirements of the law are general in their statement—necessarily so from the nature of the problem:

> "In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare, or charge."[4]

The Commission has insisted that strategic advantage is not a factor to be given weight in fixing divisions. And, in passing on divisions, it has also recognized that mileage alone is not a fair measure. The short line which performs terminal service, but

Pa. The Central Railroad of New Jersey . . . an active competitor . . . was believed to be preventing the Lehigh Valley from getting fair treatment in the handling of its traffic to the Seaboard and the management of the Lehigh Valley conceived the idea that by leasing the canal it would have a regulator which would insure an equitable arrangement from its competitors." *The Morris Canal*, a statement issued by the Lehigh Valley Railroad Co., Oct. 1, 1921.

[1] 2d Annual Report, A. B. & A. Ry. Co., 1917, p. 7.

[2] Pittsburgh & W. Va. Ry. Co. *v.* P. & L. E. R. R. Co., 61 I. C. C. 272, 283.

[3] Jackson *v.* St. Louis-San Francisco Ry. Co., 66 I. C. C. 359.

[4] Interstate Commerce Act, Sec. 15, Par. 6.

which participates only to a minor extent in the through movement, is not adequately compensated for its service under an arrangement which restricts it to a division based upon the relative length of haul alone. In many sections of the country there has grown up the practice in connection with such short haul movements, of providing for the division of a rate upon a mileage pro-rate with a minimum allowance of 25 or 30 per cent to the short line. This minimum is designed in part to compensate for the expense of terminal service. Neither does a division based upon mileage alone compensate the railroad which, in connection with its haul of the traffic, has to operate over difficult grades at a relatively greater expense than its connections operating across a prairie country. In these instances both the Commission and the carriers have recognized the necessity of compensating for the relative difference in operating conditions in providing for a division of the rates.[1]

The new law in respect to divisions provides one added test which has not been heretofore recognized: that the Commission shall consider "the efficiency with which the carriers concerned are operating, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their property." This was presumably designed to enable the weak lines within a group of railroads to be strengthened through a larger division on joint traffic. How efficacious the method will be depends upon the amount of joint business which such a carrier has, and its relative condition in comparison with the other carriers with whom it participates in the haul. The test of revenue needs obviously cannot be made the sole test, because in no case can the divisions of any carrier be made so low as to result in a requirement that it shall perform service for less than "out of pocket" cost.[2] The Federal Constitution protects any carrier against such a requirement. Nevertheless the direction to the Interstate Commerce Commission to consider the relative revenue needs is an important one, and was exercised as a part of the

[1] Hayden Brothers Coal Corporation *v.* D. & S. L. R. R. Co., 45 I. C. C. 236.

[2] Division of Joint Rates, M. & N. A., 68 I. C. C. 47, 57. The Commission has said: "We are convinced that in the case of no carrier do the reductions in divisions proposed by the Missouri & North Arkansas, or those which we shall approve, reduce the revenue on the traffic involved to anything like the out of pocket expense."

readjustment necessary to restore operation of the Missouri & North Arkansas,[1] and in the proposal to transfer a larger share of the proceeds on interchanged business from the pockets of the lines west of the Hudson to those of the New England lines. In the New England cases, too, the terminal character of the service received attention.[2]

The Commission in the first cases coming to it under the new law acceded to the requests of "poverty stricken" railroads for increased divisions. The connecting carriers were ordered to increase the divisions of the Kansas City, Mexico & Orient and of the Denver & Salt Lake (the "Moffat Road"), even though they were themselves earning less than the return fixed as "fair" in the general rate level cases.[3] It was not to be expected that this interpretation of the new law would escape challenge in court. But differences of judicial opinion may be expected until the Supreme Court shall have construed the new statute. Three Federal judges in New York dismissed the trunk line carriers' bill seeking to enjoin the enforcement of the Commission's decision in the New England Divisions Case; [4] but without formal opinion, three other judges temporarily enjoined enforcement of the order in the Kansas City, Mexico & Orient Case. The difficulty of proving confiscation, when only a portion of the revenue from freight traffic is affected by a Commission order, is such, however, that appeal to the courts for protection under the Fifth Amendment to the Constitution is not likely to be made except as a last resort, and is not likely to be successful except in clear cases.

§ 5. Other provisions of the Act are more directly in the interest of investors, as such. They concern the qualifications, powers and liabilities of officers and directors. These provisions

[1] The entire M. & N. A. affair is discussed at length, Loan to M. & N. A., 71 I. C. C. 395, by which a loan of $3,500,000 was authorized and in Securities of Missouri & North Arkansas Ry., authorizing issue of stocks and bonds in accordance with the plan previously approved, 71 I. C. C. 440.

[2] New England Divisions, 62 I. C. C. 513, 529, 564; 66 I. C. C. 196.

[3] Kansas City, Mexico & Orient Divisions, 73 I. C. C. 319; Freeman & Boettcher *v.* A. T. & S. F. Ry. Co., 73 I. C. C. 173. In the latter case, the Burlington, recognized as one of the stronger carriers, showed that during 1921 less than one-third of its gross revenue had come from interline carload freight operations.

[4] Akron, Canton & Youngstown Ry. Co. *v.* U. S., 282 Fed. 306.

are the direct outcome of disastrous failures of the system of state regulation to protect security holders of a few railroads from the results of actions by directorates, incompetent, corrupt, ill-advised, or over-enthusiastic—opinions differ except as to the results. These few instances which became known in the deflation period following 1907, and the last great speculative burst of railroad building, of which they were a symptom, disclosed a failure of the director system to function in the interest of the rank and file of the stockholders. In general this failure was due either to the inability of directors to keep in close touch with the affairs of the railroad; or to the domination of the board by a strong man, or a small group, whose wishes were translated into orders almost automatically. It was these few instances that those opposing advances in the general rate level usually emphasized in their arguments before the Commission. And, undoubtedly, the argument had a very considerable weight with the Commission: a weight so considerable as, in the 1915 Western Advance Rate Case, to call forth protest from Commissioner Daniels.[1]

It was quite in vain that publicity was given the assertion that railroad management, taken as a whole, was sound. Men's minds do not work that way. A dividend declaration gets two lines on the financial sheet of a newspaper; a receivership, a column on the first page. It is only when a bank fails that a disregard of plain duty or downright dishonesty is disclosed; but no one assumes, because some bank directors are remiss in the performance of the duties they are morally obligated to perform, that all bank directors are so remiss, or that all banks are dishonestly managed. Had railroad managers and their apologists protested less, and welcomed the pillorying of the incompetent and dishonest, their conduct would have been more constructive in its results. The confidence on which railroad credit is built depends upon reputation for sound dealings, quite as much as upon a show of earnings.

The underlying problem is inherent in the corporate form of organization. Authority to act is largely (and necessarily) delegated to executive committees, and the entire directorate meets only on stated occasions, and then pretty largely to felicitate

[1] 35 I. C. C. 497, 654.

the officers and employees and to approve the work of the management. The Commission has not hesitated to handle vigorously a situation which may result from this condition:

> "There are too many ornamental directors and too many who have such childlike faith in the man at the head that they are ready to indorse or approve anything he may do.
>
> "A director should be an active, not a passive force. He should understand the affairs of the corporation to which he gives the prestige of his name, at least to the extent of knowing the integrity of its designs, and the absence of law-breaking methods in its operations, and he should not accept positions which he cannot fill in this comprehensive way."[1]

The problem is two-fold: (1) to get directors who can reasonably be expected to devote time to the interest of the company, and (2) to provide the necessary motive to insure their insistence upon scrupulous adherence to the requirements of the law. The difficulties of the past have been largely due to lack of time and lack of interest. One of the aims of legislation which sought to secure the election of directors to direct was, therefore, to prevent any individual's taking on more responsibilities than he could be expected to assume effectively. Another was to prevent his taking on conflicting responsibilities: responsibilities conflicting because of his interest in a competing road, or because of his interest in a banking firm which might market the securities of the railroad. Exchanging directors so that harmonious relationship between competitors may be maintained would tend to increase the instances in which men would represent an outside interest rather than a direct interest in the affairs of a particular railroad.

§ 6. There are two sides to the question of "banker management." The presence of investment bankers upon the directorates of railroads has been attacked upon the grounds that as members of firms which buy and sell securities, they have used their position as directors to further their interests as bankers. The charge has frequently been rather a mere vague insinuation, quite unsupported by proofs, but the investment banker has felt it necessary to cite his peculiar responsibility to his customers: a responsibility which cannot end when the securities are placed.

[1] Financial Investigation, N. Y. N. H. & H. R. R. Co., 31 I. C. C. 32, 67, 69. Very similar language is found in Financial Transactions, C. R. I. & P. Ry. Co., 36 I. C. C. 43, 61.

Assurance of a continued contact with the affairs of the railroad is a part of the service which he professes to sell to those with whom he places securities.[1] Whether the elimination of investment bankers from individual railroad directorates, except purely as representatives of shareholders, through forbidding directors to profit directly or indirectly from the negotiation, hypothecation or sale of securities issued by the particular carrier—will really achieve more than it will destroy, is an open question.

The Transportation Act has made it unlawful for the same person to be officer or director of more than one railroad without permission of the Commission, granted upon a showing that neither public nor private interests will be unfavorably affected. In passing upon applications for permission to serve upon more than one directorate, the Commission has not announced any distinct principles. System relations have been recognized, and directors permitted to serve on boards of allied roads; but where the applications have sought permission to serve on directorates of competing lines, the permission has been denied, because of the possible conflict in interest. It is hardly a good argument to support an application to serve on boards of competing lines to insist that the applicant will refrain from voting whenever such conflicting interests may appear. Limitation of service to system boards of directors must bring home the element of responsibility, and tie the loyalty of the director to the corporation.[2]

The powers of directors were also seriously curtailed by the provisions of the Act. To protect against possible pressure caused by the presence, on railroad boards of directors, of individuals engaged in supplying railway equipment and materials, or interested in such enterprises, the Clayton Act of 1914 had provided that the carrier might not buy more than $50,000 worth in any one year from an enterprise of which an officer or principal owner is a director or officer of the railroad, except upon award to the

[1] Mr. Otto H. Kahn, of Kuhn, Loeb & Co., has frequently written in explanation of the service and responsibility of the investment banker. That firm has published separately the memorandum filed with the Commission at the time of the 1922 hearing on security issues. This memorandum, *The Marketing of American Railroad Securities*, summarizes very clearly the investment banker's services and responsibilities from his viewpoint.

[2] The Commission's practice relating to the authorization of interlocking directorates is set forth in the 36th Annual Report I. C. C. (1922), p. 33.

bidder whose bid is the most favorable to the railroad. The regulations governing these bids have been published and made effective by the Commission, to which reports of such purchases must be made when the transaction is complete.[1] The new Act looks to regulation of securities and to the assumption of financial responsibilities arising from intercorporate relations. No longer may a carrier do financing, except through the device of issuing short term notes, aggregating not more than 5 per cent of the par value of the securities then outstanding, without the express approval of the Commission; [2] no longer can leases of railroads be effective without the approval of the Commission; [3] nor can there be guarantee of return on notes, bonds, or stocks without such approval.[4]

§ 7. The Commission's power over security issues is plenary and exclusive.[5] It is unlawful for any railroad to issue securities

[1] See Regulations under Clayton Act, 56 I. C. C. 847.

[2] "Within ten days after the making of such notes the carrier issuing the same shall file with the Commission a certificate of notification . . . setting forth as may be the same matters as those required in respect of applications for authority to issue other securities." Interstate Commerce Act, Sec. 20a, Par. 9.

[3] "Lease by which one carrier leases to another all its property now owned or hereafter acquired is lawful only, and to the extent that, it is approved by the Commission." Lease of the Valley Terminal Ry., 65 I. C. C. 105. The Commission, in the New England Investigation, had condemned the lease device as "inherently vicious" because concentrating too much power in too small a stock holding, and because creating too narrow a margin between fixed charges and income. Referring to the Boston & Maine, the Commission said:

"There is in a system like this no power of resistance, no working capital, so to speak. The stockholders of the Boston & Maine are little more than residuary legatees of the railroad operations of Northern New England. In days of prosperity handsome dividends are enjoyed, but a comparatively slight wave of adversity obliterates these dividends and makes bankrupt the company." 27 I. C. C. 560, 600.

[4] Notes of the Chesapeake & Ohio R. R., 65 I. C. C. 767; Notes of the Michigan Central R. R., 790; Notes of Chicago, Milwaukee & St. Paul, 795.

[5] The power to control security issues was granted to the Commission only after a ten-year discussion which, in point of time, coincides with the period in which the necessity for rehabilitation of railroad credit was becoming apparent. The Interstate Commerce Commission urged in 1908 and 1909 that control over security issues be granted it; and made specific recommendations in some of its investigation reports, notably that in the New England Case, 27 I. C. C. 560, and in the Wabash-Pittsburgh Terminal Investigation, 48 I. C. C. 96. Indeed, the original administration bill which President Taft communicated in 1910 contained a proposed grant of this power, but the clause was stricken out, and, in its place, a provision made for the appointment of an investigating body, the Federal Securities Commission of which former President Hadley of Yale served as chairman. This committee submitted its report, November 1, 1911—a

even though permitted by a state authority, unless and until the Commission authorizes the issue, and then only to the extent indicated in the order.[1] The Commission may grant or deny the application as made, or grant it upon such terms and conditions as deemed necessary and appropriate. Its inquiry seeks to insure that the financing is for a lawful object within the corporate purposes, and compatible with the public interest, that it is necessary and appropriate for, and consistent with, the proper performance of service to the public as a common carrier, and that it will not impair the ability to perform that service. Finally it must find that the security issue is reasonably necessary and appropriate for these purposes.

The approval, therefore, looks not only at the character of the security—whether share of stock, mortgage bond, note, or debenture—but the purpose and intended use of the proceeds. Not the railroad management but the Commission is to determine finally the direction in which new funds are to be turned. If this power shall be exercised to the extent of looking at the details of management (determining whether a terminal should be extended, whether a line should be double-tracked, a bridge replaced or a tunnel enlarged, or whether a particular type of motive power or car should be adopted), the need for a carefully formed judgment of a board of directors will be eliminated. Such action would indeed work a transfer of an essential power

document essentially conservative in its character. It recognized that two alternative policies were available: either to require the express sanction of an administrative body, presumably the I. C. C., before securities were issued, or to rely on general statutory provisions under which the company directors might issue securities and be held responsible for their proper use. The latter policy received the support of the Securities Commission, which urged publicity as protection to investors. The Interstate Commerce Commission might have full power to investigate financial transactions, and to inquire into the good faith of the parties; but its investigation was to be of acts completed, not acts contemplated. "A growing railroad has constant need of money, and its officers and directors are the best judges of the amount of its annual requirements." Report of the Railroad Securities Commission, p. 16.

[1] Bonds of the New York Central, 65 I. C. C. 534, 539; Bonds of the Michigan Central R. R., 544, 546; Bonds of the C. C. C. & St. L. Ry., 549, 552. The contentions of state authorities that, as th applicant corporations were organized and existing under the state laws, the Commerce had no jurisdiction, and that the applicant, not being a Federal corporation or creature of the Federal government, was not answerable to the Federal government in any degree so far as its security issues were concerned, were denied. Notes of the C. C. C. & St. L., 764, 765; New York Central, 787, 788; Michigan Central, 790, 791.

of management from those acquainted with the intimate problems of the individual property to subordinate government officials. The report of the Commission's Finance Division upon the application of the Northern Pacific for authority "to issue not exceeding \$115,534,300 of refunding and improvement mortgage bonds, 5 per cent, series C; said bonds to be sold at not less than 90 per cent of par and accrued interest, and the proceeds thereof used to redeem at 103½ per cent of par outstanding joint 6½ per cent bonds of the applicant and the Great Northern Railway Company," contains an incisive, though brief statement of principle:

> "The applicant represents that the retirement of the joint six-and-a-halfs, as proposed, will materially reduce its future interest payments and that, therefore, in the judgment of its officers, directors and financial advisers, it is wise so to retire them. It may be that, at some future time, such retirement could be effected on more favorable terms and with greater interest savings. But corporate policy, in a case of this kind, must be determined by the carrier's directors. And since the responsibility for that determination rests with them, we do not feel that the substitution of our judgment for theirs would be warranted."[1]

No other holding, indeed, would be consistent with the final clause of each order authorizing an issue of securities: that noth-

[1] Bonds of Northern Pacific Ry. Co., decided May 3, 1922, 71 I. C. C. 583. To the earlier report on the refinancing of the joint control of the C. B. & Q. by the Great Northern, which had approved the issue of joint 6½s, Commissioners McChord and Eastman appended dissenting opinions, which insisted that the Commission should limit the interest rates authorized to 6 per cent. Commissioner Potter, in his concurrence, commented on this proposal in clear language:

> "The intimation that a forced refunding on a 6 per cent basis should have been resorted to suggests a policy of repudiation which should not be encouraged by us. In this country the investor has the right to choose the investments which he will make. When, as in this case, he is entitled under the contract which he holds to receive a definite amount at a certain time, he has the right to demand that amount in the medium which his contract provides. To force an investor to receive in payment of his debt another security worth only 80 or 90 cents on a dollar would represent a policy of dishonesty which we, on behalf of the American public, have no right to enforce and approve."

Securities of N. P. Ry. & G. N. Ry., 67 I. C. C. 458.

Commissioner Eastman's opinion that the Commission should inquire closely into the details of the proposed security issues is also illustrated in his dissent to the D. & R. G. Wn. Stock Issue Case, Stock of Denver & Rio Grande Western R. R., 70 I. C. C. 102.

> "In supervising the issue of securities by a newly organized railroad corporation, it will, I think, be conceded that we ought not to permit the company to begin its career with a burden of fixed charges which it cannot carry, or with too narrow a margin for the stockholders' interest."

ing contained in the order shall be construed to imply guaranty or obligation on the part of the United States.

§ 8. The issue of encroachment on the field of management appeared also in the Pan Handle Lease Case. There the Commission by a vote of 6 to 5 approved a 999 year lease of the Pan Handle to the Pennsylvania, which owned 98.3 per cent of the stock, attaching to the approval the condition that the Pennsylvania interests should not dispose of the Pan Handle stock without the consent of the Commission. Such a condition had previously been attached to approval of a lease of other Pennsylvania System property without dissenting opinion.[1] In that case, however, the Pennsylvania had owned all the stock, whereas in the Pan Handle case a small minority interest had opposed the lease. The Commission's report does not appear, however, to have attached great weight to this consideration.[2] The report is indeed a curious document. Five Commissioners dissented, and three subscribed to a concurrence which approved the lease, but protested against the condition requiring the permission of the Commission before the stock could be sold. Commissioner Potter voiced this protest:

> "We say it is a good thing to put the properties together. We don't even say that the stock ought not to be sold. We recognize that perhaps it should be sold—but only with our consent. We say the Pennsylvania may acquire the Pan Handle by lease *if* it will turn over to us the right to say whether an asset consisting of shares of stock shall be continued in its present form for 999 years or be converted into something else. To my mind this is an invasion in management in the field of company policy which has not been authorized and which properly was withheld from a governmental agency."[3]

[1] Acquisition of Control of the N. Y. P. & N. by the Pennsylvania, 70 I. C. C. 299.

[2] "We do not consider it necessary to discuss our responsibility in protecting the interests of minority stockholders who may object to proposed action on the part of a carrier corporation, inasmuch as it is our view that the granting of the authority herein requested will not be inimical to the interests of any of the interested stockholders." Lease of the Pan Handle by the Pennsylvania R. R., Fin. Docket No. 1466, decided July 10, 1922, 72 I. C. C. 128.

[3] Commissioners Campbell, Daniels and Hall justified their dissenting opinions in terms which indicate their belief that the Commission was seeking to exercise a power it did not possess. Commissioner Potter's explanation of his vote in favor of the report containing the condition to which he objected is as follows:

> "The explanation of my vote in favor of the report containing the offensive condition is this. Perhaps the applicant will desire to proceed

The Pennsylvania indicated that it would contest the lawfulness of the Commission's order in the courts.

§ 9. These, then, are the important general restrictions. How is adherence to their requirements provided? The Act sets up both civil and criminal liability in order to create a motive for a director to direct. Presumably he will direct because it is to his interest to direct: fines are provided as penalties to be assessed against directors or officers who "knowingly vote for" or "direct" a violation of the Clayton Act; the fine penalty is supplemented by imprisonment for knowing assent to or concurrence in an issue of securities not authorized by the Commission, issued contrary to Commission order, or for unauthorized use of the funds derived from the sale of securities approved by the Commission. Fine and imprisonment (one or both) are also provided in the event a director or officer knowingly "authorizes, consents to, or permits" a violation of the law requiring a certificate of convenience for the building or acquiring of additional mileage. Similar penalties attach (1) to holding position as officer or director in more than one carrier, except as duly authorized; (2) to benefiting personally from the sale or negotiation of securities; and (3) to paying dividends from capital account, whatever that may mean. Civil liability may attach whenever a security has been issued or a liability assumed by a carrier without proper authority, or contrary to the terms of authorization. A holder for value, in good faith and without notice that the issue or assumption is void (a security, for the issue of which the Commission's authority is required, is void if issued without this

under the report. The application has been before us for a long time. Bad as I think is the report, it seems to be the only way by which the applicant can obtain what I conceive to be even partial justice. Perhaps the applicant will conclude that the condition is illegal, as I am strongly inclined to think it is, and that it may be disregarded, as seems to me it may. Whatever we may think of our power we are not above the law. The courts may intervene in a helpful way. And then, too, it may be that sometime within 999 years this Commission will be composed of men whose views do not accord with ours. Perhaps other men at another time will correct our error. I even indulge the hope that with further consideration we may change our mind. The report is no worse than a denial and it may be helpful to have our views understood. So I vote for the report in its present form rather than for a denial."

With him concurred Commissioners Cox and Lewis. Commissioner Eastman, with whom Commissioner Aitchison joined, dissented because not believing in the lease device. With the "intent" of the condition attached he expressed himself as "in entire accord." All in all, it was indeed a "freak opinion" as the newspapers called it.

authority having first been obtained) may hold the carrier, and, as well, the directors and officers who participated in the authorization or disposal of the security. Where the possibility of fine or imprisonment for a failure to "know" might not necessarily call forth an inquiring spirit, the imposition of civil liability doubtless insures a canvass of the situation by directors.

CHAPTER XXV

THE ADJUSTMENT OF LABOR DISPUTES

§ 1. The adjustment of labor disputes by a government agency is concerned with problems of discipline, working conditions and wages. Regulation has not, however, invaded a field in which the responsible executive has previously exercised full control. Before 1920 his independent exercise of discretion had already become much circumscribed as strong labor organizations were developed and were recognized as negotiating bodies. The clear enunciation of the continuity of service principle was, indeed, the result of a law passed under pressure from labor organizations and over the protest of the railroad managers.[1]

Logically, too, an orderly method of disposing of labor disputes must be a part of any comprehensive scheme to rehabilitate railroad credit. This is in part because the sums paid as wages and salaries occupy a large place in railroad costs; in part also because strikes, or even threats of strikes, causing business concerns to hesitate to make shipments, demoralize operations and cut into earnings. The risk of buying into a strike when buying railroad securities must be compensated for in the rate of return offered investors. To minimize the possibility of strikes is to minimize one element of risk which the investment market regularly discounts.

The importance of the labor problem in any rehabilitation of credit, based upon the rule of rate making, arises from the con-

[1] Wilson *v.* New, 243 U. S. 332.

dition that the wage bill is the largest single item of railroad costs. Since 1916, wage payments have absorbed a continuously rising share of the railroad operating revenue. Net operating income, over a billion dollars in 1916, was, in 1920, less than $62,000,000. In 1921, the figure was $614,810,531. Although there had also been increases in the costs of fuel and supplies, the increase in the wage item overshadowed these in importance. The 1920 payments in wages and salaries took three-fifths of the income. Wage payments, 40.8 cents out of the "railroad dollar" in 1916, had, in 1920, mounted to 59.9 cents. In 1921, the figure was 50.35 cents. It is clear, therefore, that there must be a close relationship between the level of wages paid and the level of railroad rates charged. The rule of rate making insures recognition of these mutual relations: working conditions, wages, and prices of materials govern costs; costs govern the level of rates.[1]

§ 2. In part, the higher wage costs of 1920 were due to a higher level of wages and in part to newly established uniform agreements national in scope. These National Agreements covering standardized working conditions for classes of employees, formerly dealt with as individuals, were the inheritance from the period of government operation.[2] During Federal control, the apparent physical impossibility of dealing with the peculiar individual conditions of a large number of employees, and of dealing with working rules on a number of separate roads, had led to wider organization of employees. Of the groups affected by the National Agreements, the clerks, the maintenance of way forces, the signal men and stationary firemen, and the "shop crafts,"[3] only the shop men had been generally organized before the war. By the National Agreements, any previous agreements with the managements of individual roads were superseded. The standardization of working rules (not wages) to be applied nationally

[1] Reduced Rates, 1922, 68 I. C. C. 676, 688, 740.

[2] Director General Davis estimated that, all told, the annual wage charge of the railroads had been increased from Jan. 1, 1918, to Jan. 1, 1920, by $865,000,000.

[3] Included in the shop craft organizations are the Brotherhood Railway Carmen of America, the International Alliance of Amalgamated Sheet Metal Workers, the International Association of Machinists, the International Brotherhood of Boilermakers, Iron Shipbuilders and Helpers, the International Brotherhood of Blacksmiths, Drop Forgers and Helpers, and the International Brotherhood of Electrical Workers. These organizations are affiliated with the American Federation of Labor.

to the classes of employees not in train service, regardless of the variation in local conditions, was a revolutionary step. To a considerable extent standardization of wage rates had been achieved previously.

§ 3. The provisions of the National Agreements went into great detail: the length of the working day; payments for time not worked, and for overtime; the restriction of apprenticeship; the classification of jobs on craft lines. The Railroad Administration, guided by vote of the employees, had already abolished piece work, so that the clauses in the National Agreements rather ratified an existing condition than created a new one. In the clerks' agreement there were 87 clauses governing working conditions; in the shop craft agreement, 186 clauses. The interpretation and enforcement of these agreements unavoidably gave rise to not a few absurd situations due to the application of general rules to particular local situations.[1]

The railroad executives' objections to these National Agreements arose not only because of the character and scope of their provisions but from the manner and time of their adoption. The first of the agreements, with shop crafts, was signed September 20, 1919, about five months before the return of the railroads to their owners; the last, with signal men, January 22, 1920, about

[1] Some "typical" cases were cited by Mr. Kruttschnitt:

"The Pere Marquette Railway was compelled to pay $9,364 in back pay to four employees because their titles under these agreements were changed by a decision of the Director General, while the motive of their duties and the volume of their work remained the same.

"An employee of the Southern Pacific Tucson shops was paid $50.05 for three days' work because he was sent 214 miles to repair a gas engine, 45½ hours being punitive overtime, most of which was spent in traveling or waiting. As a result of several emergencies of this kind he was allowed 377½ hours in a 23-day working month, earning $272.16, and a pipe fitter from the same shop was allowed 391 hours in a 23-day month, earning $281.52, mostly punitive and double time allowed while traveling, in addition to his own expenses.

"Southern Pacific employees whose sole duty was to keep watch on stationary engines and to stop the engine in case anything went wrong, were reclassified by the Director General as 'electrical workers.' one man on Salt Lake Division being given back pay of $2,381.00; another $2,094.00; another $2,009.00; another $2,003.00, and six others, amounts varying from $1,500.00 to $1,900.00.

"Men employed to couple and uncouple hose between the cars (not as difficult or hazardous a task as hitching a span of mules), are now classed as carmen, receiving 80 cents per hour, with time and one-half for Sundays and holidays, averaging about $215.00 per month, for working seven hours and forty minutes per day."

forty days before the surrender of the properties. It was entirely clear at this time that public sentiment demanded private operation, and, indeed, the President on December 24, 1919, had announced his intention of surrendering the properties, March 1, 1920. Considering this condition, the haste was almost indecent. The negotiations, as to shop crafts, if they can be called such, were conducted very largely with representatives of the Director General, who, as it happened, at one time or another, had been connected with labor organizations, and who had no experience with managerial problems on individual properties of the scope faced by a railroad manager.[1]

It is, of course, easy to criticise the Railroad Administration, much easier than to say what should have been done that could have been done. During hostilities the Director General was charged with the responsibility of insuring continuous operation in order that there should be an uninterrupted flow of men and materials to the Seaboard. After the Armistice, the future governing policy was not immediately discernible, and the country was soon in the midst of the *post bellum* speculative period in which prices and wages were again bid up. It was necessary at all costs to keep traffic moving. What a cry would have gone up from the business interests had a strike tied up the movement of freight in the boom months of the autumn and winter 1919-1920!

[1] Undoubtedly the railroad managers were most bitter on the subject of the shop crafts National Agreement. The chairman of the conference committee of managers, testifying before the Senate Committee on Interstate Commerce in 1921, referred to the method of its negotiation:

> "The final 'negotiation' of the agreement really amounted to a session of labor representatives sitting down with former confrères and working out a schedule satisfactory to themselves, but in large part wholly unsatisfactory to the railroad officers who represented the Government, and who had previously disagreed on about half of the rules suggested."

When an agreement had been first proposed, equal representatives of the shop crafts and of the Regional Directors agreed on about ninety (90) rules proposed and disagreed on more than one hundred others. The whole matter was next turned over to the Railroad Administration's Board of Railway Wages and Working Conditions, consisting of three representatives of the men and three representing the Railroad Administration. Nothing resulted. The matter then went to the Director General, who turned it over to the Director of the Division of Operation, who passed it on to his assistant, Mr. McManamy, "with instructions to negotiate to a conclusion and either bring in an agreement or a disagreement on which the Railroad Administration would stand." It was Mr. McManamy's committee which "negotiated" with the shop crafts' committee, and reached the agreement which became binding on the railroads, when returned to their private owners.

The truth of the matter is that the Director General had his back squarely against the wall and was fighting against odds. It is no more than fair to credit him with having done the best that was humanly possible in a very difficult and ever changing situation. The labor leaders did make the most of the emergency. A labor union, like an army, can win only when it is on the offensive. Undoubtedly, ends were achieved for which a long struggle had been anticipated. But, in the face of all that was done, the times were such that it was still difficult for the "conservatives," who were in control of the unions, to keep the "radical" element in check. It is no more than justice to the labor leaders to acknowledge that they too occupied a difficult position. Outlaw strikes appeared even in wartime. Private industries were greatly outbidding the railroads in the labor market. To that great mass of railroad employees who stuck by the job, in the face of almost overwhelming temptation, credit is also due.

It was generally recognized that the return to private operation meant labor readjustments. Certain human motives, repressed during the war, were loosed. A wage advance was already in the air; and the railroad managers were certain to seek abrogation of the National Agreements, or any other proper means of controlling expense. Early in 1919, groups of employees had requested wage advances to meet the increased cost of living, and, on August 25, President Wilson had asked the employees to await a better opportunity to determine the course of the price curve. When no relief appeared in the later months of the year, the organizations became more insistent. But the Director General, taking the stand that Federal control was soon to end, declined to act, as he had acted in the matter of the National Agreements, and in this decision he received the support of the President. It was understood, however, that the Transportation Act would provide machinery for the hearing of the controversy.

§ 4. The Railroad Labor Board was created: nine members, three representatives of the employees, three representatives of the railroad managements, and three representatives of the public. All are appointed by the President, the public group without nomination, the management group from six nominees of the carriers, the labor group from six nominees of the employees. The terms of one-third of the membership expire in successive

years, the successors of the original appointees being appointed for five year terms. Annual salaries of $10,000 are provided. A decision of the Board requires a concurrence of at least five members; and, in a wage decision, at least one of the public representatives must concur.

There is both weakness and strength in this scheme of organization. The method of choosing insures that two-thirds of the membership shall be "practical men." [1] This means also that two-thirds of the membership shall have been trained as partisan negotiators. Too likely there will be fights on essential questions of principle; compromise when compromise is possible, and a partisan cleavage when the exigencies of the situation will not

[1] The determining objection to awards of arbitration boards in whose deliberations distinguished citizens participated, as advanced by the union leaders, was that these gentlemen, not being trained in the technique of railroading, were unable to prepare a decision not subject to wrong interpretation by the managers. The men's representative on the Conductor's Arbitration of 1913, Mr. Shepard, said of the neutral arbitrators, who participated in that decision:

"These two gentlemen, well known and well versed in most of the sciences and ideas of the day, found themselves completely at sea, and so admitted, in regard to the technique and details of the railway problem. They wrote in very choice English, if you please, rules that they thought would serve the purpose . . ..

"The only time the brotherhoods have been able to get a satisfactory settlement of any question which we have had up has been when the brotherhoods' representatives have sat face to face with the managers and said to them: 'This rule means so and so; it should be agreed in such and such a way.' The railroad managers have finally said, 'Yes.' Even then we have difficulty in having their memory serve them properly." Hearings on H. R. 19730, 64th Cong. 2d Sess., Committee on Interstate and Foreign Commerce, p. 162.

Mr. Carter, President of the Brotherhood of Locomotive Firemen and Enginemen, Director of Labor in the Railroad Administration, wrote of the wartime adjustment boards:

"The work of these boards demonstrates not only the advisability of the creation of such boards, but the necessity of their continuance, either under Federal Control of railroads or thereafter. The fact that boards are bipartisan without any 'umpire' or 'neutral member,' and all of which members are experts in railroad agreement matters, have led both officials and employees to have confidence not only in the fairness of decisions reached but as to the technical ability of the members of the boards to pass intelligently upon all controversies submitted for decision." Annual Report of W. D. Hines, Director General of Railroads, 1919, Division of Labor, p. 50.

Under the present law even the dispute which gets as far from the rails as the Labor Board is handled by a body two-thirds of whom are, presumably, "practical men." The five-year tenure of office may be expected to initiate the other third; and, if a tradition of reappointment, similar to that governing the Interstate Commerce Commission, is created, a body of men, presumably expert in railroad labor matters, can be perpetuated.

permit of ignoring a direct issue.[1] It would be most unfortunate were the struggle inside the Board to degenerate into one of "lining up" the public representatives. Were the latter to function primarily as peace makers, the result cannot be especially conducive to clear statement of principle. If the feeling that the internal workings of the Board are of that character becomes general, the decisions of the Board will hardly gain that public support which must be the basis of any substantial achievement. This is vital, because the Board, having only a power to report,

[1] Considering the volume of the work, and the controversial character of the subject matter, the Board, certainly until the summer of 1922, had been notably successful in presenting a unified front. This does not mean that there has always been unanimity in the Board. The railroad group dissented from the payment of punitive overtime to clerks within the ten-hour basis as "unjust, unreasonable, and unfair."

The railroad group as a whole dissented in a discipline case which presented a clean-cut issue. A locomotive engineer of the Northern Pacific was discharged for entering a yard with a train of 80 empty cars at a speed of 40 miles an hour. That he did this was testified by the division superintendent who witnessed the incident. On petition of the railway brotherhoods a majority of the Labor Board ordered that the engineer should be reinstated "providing he shall give assurances to proper officials of the carrier of his willingness to abide by the rules." A dissenting opinion was filed by the chairman and all three railway members of the board, who said: "In deciding to change or mitigate the discipline administered by the carrier with its better knowledge of all the surrounding circumstances, the Labor Board has assumed a responsibility not contemplated by the Transportation Act, and has taken a step which tends to the breaking down of proper and necessary discipline on all carriers." Occasionally individuals have dissented.

There has not always been entire accord even within the ranks of the labor groups. Such a case was the New Orleans Great Northern wage case. There a principle of wage adjustment was approved for emergency situations in which it was shown that the financial condition of a carrier did not permit of paying the rates of wages generally approved by the Board. This principle of "the ability of the carrier to pay" was recognized, not as controlling, but as "entitled to secondary consideration" when the carrier was "dependent almost entirely on local business, or whose principal function, in the final analysis, is the development and upbuilding of a new or comparatively new country." The labor member, representing the shop crafts, Mr. A. O. Wharton, wrote a vigorous and extended dissenting opinion, raising questions of principle and procedure. Mr. W. L. McMenimen, another of the labor group, without formally dissenting, made the following statement: "I am not in accord with the majority decision and cannot concur in the dissenting opinion as it contains many misleading and greatly exaggerated statements." Mr. Wharton's response was by no means conciliatory. "In answer to the reference made in the dissenting opinion by Board Member McMenimen, it is sufficient to say that a mere declaration without supporting data or facts represents nothing and needs no other reply." Dec. No. 290.

Mr. Wharton also dissented to the opinion which established certain rules for general use in the drawing up of new shop craft agreements. Dec. No. 222, pp. 13–26.

is dependent upon public opinion for the enforcement of its decisions.

But the public representatives are not placed upon the Board solely as neutrals. The public interest is two-fold: an interest in continuous service, and an interest in the costs of operation, for which the public must pay ultimately.

It is not without the realm of possibility (however improbable) that the railroad and labor interests, left unrestrained to do their will without representation of the public interest, as such, might connive to increase the costs which the Transportation Act recognizes must be met by freight and passenger rates. The Act takes cognizance of this possibility. Indeed, to prevent a carrier and its employees, in conference, increasing wages or salaries to an extent likely to necessitate a substantial readjustment of rates, the Board may suspend such a local decision, and, in due course, either affirm or modify it.

The clear assertion of the right of the public to continuous service goes back to the report of the Board of Arbitration in the Eastern Locomotive Engineers wage dispute in 1912. Then a group of distinguished citizens had declared:

> "It is an intolerable situation when any group of men, whether employees or employers, have the power to decide that a great section of the country, as populous as all of France, shall undergo great loss of life, unspeakable suffering, and loss of property beyond power of description, through stoppage of a necessary public service."[1]

Compare now the language of the Labor Board:

> " . . . the Transportation Act was not enacted primarily for the protection of the rights of either carrier or employee, except in so far as such protection was involved in the paramount purpose of the Act; that is, to insure to the public as far as possible, efficient and uninterrupted railway transportation by protecting the people from the loss and suffering incident to the interruption to traffic growing out of controversies between the carriers and the employees who do their work. This Act is the Congressional assertion of a public right."[2]

The law provides also for Railroad Boards of Labor Adjustment, which may be voluntarily established by any carrier, group of carriers, or carriers as a whole, on one side, and an

[1] Fisher, *Use of Federal Power in Settlement of Railway Labor Disputes*, Bulletin No. 303, U. S. Bureau of Labor Statistics, p. 44.
[2] Dec. No. 982 (Contract Case), May 9, 1922.

organization or group of organizations on the other within the terms of the voluntary agreements constituting them. The creation of such boards calls for agreement by the parties; there is nothing in the act to justify an assertion that unwillingness to agree to the creation of a national adjustment board could be fairly interpreted as an evasion of one of its essential provisions. Their erection, indeed, proved the exception, rather than the rule.[1] These boards are essentially conferences of "practical men" such as the union leaders insist they prefer. They are granted jurisdiction, with power to decide disputes involving grievances, rules of working conditions, (not rates of pay), whenever conference between the representatives of the interested parties has failed. When such boards exist, but are unable to reach a decision, the Labor Board may assume jurisdiction. In all disputes involving wages, disputes go at once to the Labor Board. When they do not exist, appeal is direct from the local conference to the Labor Board. One of the ends sought by the shopmen's strike of 1922 was the creation of a national adjustment board, undoubtedly looking toward the reëstablishment of the machinery of the abrogated national agreement under another name. The statements which, in the summer of 1922, appeared in the public press—purporting to include among the grievances of the shopmen, the alleged failure of the carriers to agree to a national board, when the law does not provide for such boards except in permissive terms—were hardly entirely frank.

[1] Thirteen roads in Western Territory and the Trainmen's organizations (The "Big Four": Order of Railway Conductors, Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Enginemen, Brotherhood of Railway Trainmen) formed such a board, composed of four representatives of each interest—one from each of the unions, a full time railroad member, and three operating officials, the membership of the latter group rotating among operating officials. The Baltimore & Ohio and New York Central formed a joint board; and a board was formed in the Southeast. Only train service employees were concerned. The railroads refused to enter into agreements for the creation of adjustment boards with the organizations interested in the National Agreements.

Because the Adjustment Boards had not been created to handle the multiplicity of details, the Labor Board divided its membership into three informal Bureaus, each composed of three members, one from each "group," to hear cases involving discipline and minor interpretations of the rules. The Bureau merely recommends to the Board, as a whole, which alone has power to issue an opinion. The division of work amongst the Bureaus is on functional lines: Bureau No. 1, Clerks, Telegraphers, etc.; Bureau No. 2, Shop Crafts, Maintenance of Way Forces; Bureau No. 3, Transportation Forces.

But before either an Adjustment Board or the Labor Board will consider a dispute, there must have been a real effort in solving the problem by the parties directly concerned.[1] This holding recognizes a sound principle in the adjustment of labor disputes, if there shall be a working understanding by both parties:

> "Industrial problems vary not only with each industry, but in each establishment. Therefore, the strategic place to begin battle with misunderstanding is within the industrial plant itself. Primarily, the settlement must come from the bottom, not from the top."[2]

In no industry is this principle more true than in the railroad business. Operating conditions, the volume and character of work and traffic, the length of divisions, and, frequently, the personality of the manager or employee's representative cause problems to vary from road to road. On a railroad, there will always be questions of seniority, discipline, and the interpretation of minor rules where only an appeal will satisfy the employee.[3]

§ 5. Essential issues of principle were soon presented to the Board. In March, 1920, immediately after the private managers began operation of their properties, conferences were inaugurated, the managers seeking abrogation of the National Agreements, the men seeking increased wages. The result, as might have been expected, was deadlock: "complete failure to agree." The Labor Board, when it became clear that much time would be required for investigation, announced, on June 12, that its wage decision would be retroactive to May 1. Both parties agreed to a separation of the question of rules and working conditions from the wage question, and to a postponement of the former to a later day. The opinion, confined solely to the wage issue, as such, was handed down July 20, 1920.[4]

[1] This principle the Labor Board made clear in its Decision No. 1: Application of Edward A. McHugh et al., 1 Decisions, U. S. R. R. Labor Board. This application did not show that "the applicants had held or sought conference between these representatives and the carriers."

[2] Industrial Conference Report to the President, March 6. 1920, p. 7.

[3] Discipline cases, and cases involving the interpretation of rules, are scattered through the Board's opinions. An Index-Digest published by the Railway Accounting Officers' Association is a key to these opinions. Some typical decisions on these points are Nos. 496, 498, 546, 574, 578, 579, 661, 807, and see *Decisions of the U. S. Railroad Labor Board with Addenda and Interpretations, 1921*. This volume also contains a cumulative index-digest.

[4] Dec. No. 2; 1 Decisions, U. S. R. R. Labor Board, 151. Mr. Howard Elliot has suggested that the initiative for wage reductions should rest

The Board found no "formula" by which to work out a just and reasonable wage for the variety of positions involved in the dispute: approximately 2,000,000 men comprehended in more than 1,000 classifications. The Board "considered" and gave "due weight" to seven circumstances as directed in the Act:

(1) The scales of wages paid for similar kinds of work in other industries:
(2) The relation between wages and the cost of living;
(3) The hazards of the employment;
(4) The training and skill required;
(5) The degree of responsibility;
(6) The character and regularity of the employment; and
(7) Inequalities of increases in wages or of treatment, the result of previous wage orders or adjustments.[1]

It even considered "other relevant circumstances":

"the effect the action of this Board may have on other wages and industries, on production generally, the relation of railroad wages to the aggregate of transportation costs and requirements for betterments, together with the burden on the entire people of railroad transportation charges."[2]

The Board further endeavored to fix such wages as would provide "a decent living and secure for the children of the wage earners opportunity for education, and yet to remember that no class of Americans should receive preferred treatment and that the great mass of the people must ultimately pay a great part of the increased cost of operation entailed by the increase in wages." If the opinion be condemned as vague, it must be condemned as being purposely so: the determination of just and reasonable wages—like the determination of a reasonable rail-

with the carriers, new wages to be at once effective, subject to review by the Labor Board. The present arrangement may so delay action as to result in insolvency, and action of the Board may be so long delayed as to cause serious financial loss. It is not possible to make wage reductions retroactive. Hearings, Senate Committee on Interstate Commerce, *Railroad Revenues and Expenses*, 67th Cong., 1st Sess., pp. 408, 409.

[1] A finding for the employees was made on the first two items; contradictory evidence on the third, fourth, and fifth, made impossible any clean-cut appraisal; but it was clear that railroad employment is on the whole more regular, and the character of work more desirable than similar employment in general industry. The emergency character of the proceeding made impossible any real investigation into the results of previous adjustments.

[2] Dec. No. 147. This decision, rendered June 1, 1921, became effective July 1, 1921.

road rate—is a matter of "estimate and judgment." Undoubtedly, however, the increase in the cost of living, which appeared direct and tangible, was given the greatest weight in justifying the wage advance. But the seed was, at the same time, sown for future controversy whenever the levels of prices and outside wages should recede. A year later a general cut of about 12 per cent—in substance, a compromise—was approved.

Strike votes were taken; and, late in October, 1921, when a strike was called by certain train service organizations, some men left isolated roads before the strike order was rescinded. All in all, the public took the situation very calmly. The feeling that the time for a showdown had come was general. But the Labor Board brought pressure upon the Brotherhood leaders, who must have realized that they faced general public condemnation. The strike was called off. The Brotherhoods did not come away empty-handed, for they had "assurances" that the pressure of business would prevent the Board approving further general pay cuts for at least a year, from July 1, 1921. In June of 1922 came the series of wage reduction orders, to be effective July 1, 1922. These affected shop crafts, maintenance of way forces and clerks, but not the train service employees. The shop crafts struck, as did some clerks, notably those on the roads serving the non-union bituminous coal fields, but the maintenance of way forces accepted the cuts under protest, and applied for a rehearing of their case. In October, the Labor Board granted them some advances in wages.[1]

§ 6. The Labor Board opinion in the controversy over the National Agreements must likewise be recognized as a compromise.[2] The organizations had contended that to abrogate the National Agreements would result in loss of time consumed in negotiation, and in much irritation. They even pleaded a strategic disadvantage: the local labor organizations in conference on

[1] The Board then stated that, while it had considered "all the seven elements or factors set out in the Transportation Act, 1920, for its guidance in fixing just and reasonable wages," it had laid special stress on that which required taking into account the scales of wages paid for similar kinds of work in other industries. It was found that there had been no "pronounced change" in the cost of living after March 1922. A "conservative increase of wages" was granted. Dec. No. 1267, dated October 21, 1922, effective October 16.

[2] Dec. No. 119, April 14, 1921, effective July 1, 1921.

individual lines would be exposed "to the entire power and weight of all the carriers acting through the Association of Railway Executives, on the conferring carrier." Such disparity of force would produce "an inequitable result highly provocative of discontent, and likely to result in traffic interruptions." Doubtless, the labor leaders were unduly modest in appraising their own skill as negotiators, and their control over the rank and file. It should be recognized that it was their game to make secure what they had, or as much as possible. Abrogation of the National Agreements might work to their disadvantage; it could hardly work to their advantage. The carriers were on surer ground: they insisted that the conditions varied as between localities and could be handled with better effect locally, that differences in rules and working conditions should measure differences in local conditions. It is not without significance that, in 1922, the shop crafts stood out for a "national settlement" of the strike.

The compromise, as announced by the Board, insisted that, while the National Agreements contained rules which were susceptible of general application without undue hardship on the carriers, other rules could best be adjusted to meet local conditions. The subject was therefore remanded to the carriers and the employees with instructions to confer and to prepare new agreements. Sixteen general principles were outlined to govern these conferences, pending which the National Agreements were to continue in effect until July 1.[1]

[1] The sixteen general principles are of such importance as to warrant their reproduction in full:

"1. An obligation rests upon management, upon each organization of employees, and upon each employee to render honest, efficient, and economical service to the carrier serving the public.

"2. The spirit of co-operation between management and employees being essential to efficient operation, both parties will so conduct themselves as to promote this spirit.

"3. Management having the responsibility for safe, efficient, and economical operation, the rules will not be subversive of necessary discipline.

"4. The right of railway employees to organize for lawful objects shall not be denied, interfered with, or obstructed.

"5. The right of such lawful organization to act toward lawful objects through representatives of its own choice, whether employees of a particular carrier or otherwise, shall be agreed to by management.

"6. No discrimination shall be practiced by management as between members and non-members of organizations or as between members of different organizations, nor shall members of organizations discriminate against non-members or use other methods than lawful persuasion to secure their membership. Espionage by carriers on the legitimate activities of

On June 27th, an Addendum to the decision was issued, recognizing that, since conferences had not always been successful in agreeing upon new rules, the pertinent rules of the National Agreement should be continued in effect until consideration of the dispute and decision by the Labor Board.[1]

labor organizations or by labor organizations on the legitimate activities of carriers should not be practiced.

"7. The right of employees to be consulted prior to a decision of management adversely affecting their wages or working conditions shall be agreed by management. This right to participation shall be deemed adequately complied with, if and when the representatives of a majority of the employees of each of the several classes directly affected shall have conferred with the management.

"8. No employee should be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this principle. At a reasonable time, prior to the hearing, he is entitled to be apprised of the precise charge against him. He shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by a counsel of his choosing. If the judgment shall be in his favor, he shall be compensated for the wage loss, if any, suffered by him.

"9. Proper classification of employees and a reasonable definition of the work to be done by each class for which just and reasonable wages are to be paid is necessary, but shall not unduly impose uneconomical conditions upon the carriers.

"10. Regularity of hours or days during which the employee is to serve or hold himself in readiness to serve is desirable.

"11. The principle of seniority long applied to the railroad service is sound and should be adhered to. It should be so applied as not to cause undue impairment of the service.

"12. The Board approves the principle of the eight-hour day, but believes it should be limited to work requiring practically continuous application during eight hours. For eight hours' pay eight hours' work should be performed by all railroad employees except engine and train service employees, regulated by the Adamson Act, who are paid generally on a mileage basis as well as on an hourly basis.

"13. The health and safety of employees should be reasonably protected.

"14. The carriers and the several crafts and classes of railroad employees have a substantial interest in the competency of apprentices or persons under training. Opportunity to learn any craft or occupation shall not be unduly restricted.

"15. The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class. No such agreement shall infringe, however, upon the right of employees not members of the organization representing the majority to present grievances either in person or by representatives of their own choice.

"16. Employees called or required to report for work, and reporting but not used, should be paid reasonable compensation therefor."

[1] Thus the abrogation of the National Agreements as such or in whole was not postponed. Addendum 2 to Dec. 119 (June 27) indicates that all those rules agreed to in negotiations subsequent to decision 119 replaced, effective July 1, 1921, similar rules of the National Agreement. Pending

Three of the governing principles announced in the decision soon called for application to particular facts. The Board had "approved" the principle of the eight-hour day (No. 12); yet the principle has been applied only in a limited fashion; applied to the shop crafts to include punitive wage rates (time and a half) for all overtime;[1] applied to the clerks, signal men, and telegraphers, but with the punitive wage rate effective only after the ninth hour;[2] applied to stationary firemen, oilers and maintenance forces, with the payment for the ninth and tenth hours on the straight hourly basis.[3] The principle that a "proper" classification of employees, and a "reasonable" definition of work to be done by each class should not impose uneconomical conditions upon the carriers (No. 9) sought to reach such rules as Mr. Kruttschnitt insisted made it necessary, in changing a nozzle tip in the front end of a locomotive, "to call a boiler maker and his helper to open the door, because that is boilermakers' work; to call a pipeman and his helper to remove the blower pipe, because that is pipemen's work; and to call a machinist and his helper to remove the tip, because that is machinists' work; also for the same force to be employed for putting in the new tip."[4] The restoration of piece work was made permissible when general rules were approved for inclusion in the agreements with shop crafts, the groups most likely to be

final decision of the Board, the method of paying overtime was definitely prescribed for the period of July 1, 1921, to the effective date of the final decision, and when any other rules had not been agreed to, the similar rules of the National Agreèment were continued temporarily in effect.

During the winter of 1921-1922, when the Board made its final decisions on rules in dispute, it made the compensation rules effective back to July 1, 1921, when more favorable to the employees than the overtime rates provided by Addendum 2.

Technically the order of the Board postponing the date did not fix a definite limit; actually, however, the National Agreements were technically abolished in whole on July 1st, although a portion of them were restored to effect for some months thereafter where the parties were in disagreement. The fact is that after July 1, 1921, there was a mixed condition that it is practically impossible to compass by a short statement.

[1] This rule recognized further, however, that certain classes of work must be done on holidays, etc. (Rule 6), Dec. 222.

[2] Dec. 630 (Clerks); Dec. 707 (Signalmen); Dec. 757 (Telegraphers).

[3] Dec. 501 (Maintenance Forces); Dec. 725 (Stationary Firemen and Oilers).

[4] This is an extreme statement. Such might happen; it did not generally occur. It points a possibility rather than a probability.

affected.[1] The third rule which came up for extended consideration was No. 15—governing the method of choosing negotiators. This dispute finally went to the courts on the claim that the Board had exceeded its jurisdiction. The lower court decided that the Act gave the Board no power to interfere with the appointment or choosing of conferees. This opinion was reversed by the Circuit Court of Appeals, July 20, 1922.

§ 7. The Pennsylvania Railroad and the shop crafts organization (System Federation No. 90 of the Railway Employees Department, A. F. of L.) failed in conference to agree on a method for choosing employees' representatives to conduct negotiations. The railroad sought to limit the choice of conferees to employees; the shop craft organization sought to be represented by their official negotiators, whether employees or not. Each side adopted a plan and held a separate election of its own. Each side reported a different result and made conflicting claims and charges. The Labor Board, after a full hearing, held both sides in error, and directed another election to be held under rules which it prescribed.[2] Conference for the completion of arrangements was directed, but the railroad declined to accede to the ruling of the Board. Instead it applied to the Board asking that the Board vacate and set aside its order as exceeding its powers.[3] When this request was denied, the railroad appealed to the courts, seeking there to vindicate its stand, and thus to avoid public condemnation for declining to obey the Board ruling. As a practical matter, so far as this one dispute is concerned, the lower court's ruling in favor of the Pennsylvania may be considered as final and the overruling of the lower court by the Court of Appeals is unimportant, since the appeal to the Supreme Court has delayed determination of the question of authority until after time has very largely removed the occasion for the dispute. Indeed, the Pennsylvania in its appeal to the Labor Board included what the Board called "a somewhat vague statement" to the effect that

[1] Addendum No. 3 to Dec. No. 222; Rule 1:
"This rule is intended to remove the inhibition against piece work contained in Rule 1 of the shop crafts' national agreement, and to permit the question to be taken up by negotiation on any individual railroad in the manner prescribed by the Transportation Act."

[2] Dec. No. 218, subsequently (Addendum No. 1) the Board authorized a secret ballot.

[3] Order in re Docket 404.

the employees' representatives had signified their approval of the agreements negotiated by the representatives chosen under the company plan of election. And during the shop craft strike the Pennsylvania claimed to have kept its shop forces substantially intact. Practical good sense will work out of the particular difficulty. But a decision of the Supreme Court upholding the carrier contention is more likely to result in amendment of the law than in anything else. That often has been the result of the successful resistance to attempted exercise of power by the Interstate Commerce Commission.

§ 8. Another important question of jurisdiction arose from the practice of certain carriers contracting with "so-called independent agencies" for repair and maintenance work. The shopcraft wages and the wages for common labor had, in the war time, been subject to severe outside competition. Wages were undoubtedly inflated, and this inflation was reflected in the railroad wages. These same classes of labor, on the outside, also felt severely the effects of the depression, and in those centers where there were machine shops, and industries employing unskilled laborers, railroad managers found themselves paying wages considerably above the going rates. As the tide of wartime wages receded in the competitive labor market, the railroad men were left on high ground.[1]

The contract made by the Indiana Harbor Belt with the "Burnham Car Repair Company," the first to be considered in a published decision of the Board, is an interesting document. The shops of the railroad were turned over to a newly formed company, the railroad furnished all tools, machinery, equipment

[1] So Mr. William Butterworth, President, Deere & Co., Moline, Illinois, wrote early in 1922:

"In my factory at Moline a machine operator gets 35 cents to 58 cents an hour, according to his efficiency and his length of service. His next-door neighbor, maybe, is classed as a machine operator in the railroad shops at Moline, and he receives for work of the same grade or lower, whatever his term of service and without regard to special efficiency, 77 cents an hour.

"The poorest workman of that class receives from the railroads 42 cents an hour more than my experienced workman, and 19 cents an hour more than my best. You may imagine the consequence of this disparity on labor generally.

"A common day laborer in the railroad shop gets 43 cents an hour whereas my best unskilled workmen get but 30 cents. The common day laborer for the railroad gets more than my best-paid machinist's helper, a semi-skilled and ambitious operator." *Nation's Business*, February, 1922.

and supplies and all material stock; work was done under the supervision of the railroad's foreman. The compensation paid for the work done was cost, plus 5 per cent. The car company might do outside work, paying for the use of the carrier's property, but the Indiana Harbor had preference. The car company employees were required to familiarize themselves with minor operating rules of the railroad, especially safety rules. The railroad assumed financial responsibility in the case of personal injury or death claims. The railroad discharged its car repairers, and declined to hold further conferences on the grounds that it no longer had a car department. The shop employees, as employees of the contractor and not of the carrier, it was suggested, were not subject to the Transportation Act. Piece-work rates were made effective.

The Board found that the employees had failed to substantiate their contention that the contracts were actually fraudulent, and were mere subterfuges to evade the Act. But it did find that the contractor was in effect merely an agent of the carrier performing only one useful function in the operation—it was the medium by which the piece-work system was substituted for the wage scales, conforming to the Labor Board's opinions.[1] The Labor Board insisted that the carrier could not delegate to a contractor the power to violate and annul labor agreements, when a strike by the employees of a contractor would as effectually result in an

[1] "To the outside observer, and so far as the public is concerned, the car repair department of this carrier has undergone no real change. The carrier's own shops along its own lines are maintaining the carrier's car equipment exactly as they did before these contracts were made. Very largely, the carrier's same foremen and inspectors are in charge and its same careful supervision is being exercised. The carrier is furnishing all the necessary material from its own stores and supply houses as it did before. The employees of the contractor are riding the carrier's shop train gratis from their homes to their work just as they did before, except that no passes are issued to them for fear of violating the law. When a wreck occurs anywhere on the carrier's property, the employees of the contractor go out and look after it. The employees of the contractor are required to familiarize themselves with the operating rules of the railroad pertaining to safety. The carrier is carrying accident insurance on the contractor's employees. The carrier's tools, machinery, and equipment are all being used in the operation, and the contractor had none of his own. The contractor has no leasehold on the plant or shops of the carrier. The carrier says it is free to do any of its work anywhere else, as it sees fit. On 60 days' notice, either party can terminate the contract. The contractor does not even have any control over the wages paid the employees. The contract contains the carrier's ready-made piece-work schedule, which the contractor must use." Dec. No. 982, p. 10.

interruption of traffic as if the men were the direct employees of the carrier. One purpose of the Transportation Act, continuity of service, would be defeated.[1] The Labor Board, therefore, held the contracts in violation of the Transportation Act, in so far as they were consummated to remove the employees affected from the application of the Act. Those provisions of the contracts affecting wages and working conditions were held in violation of the decisions of the Board governing those matters.[2] Affirmatively, and in vigorous language, the Board asserted both the application of the Transportation Act, and its own jurisdiction.[3] In the negotiations preceding the calling of the shopmen's strike, the Labor Board secured public assurances from the railroad executives that contracting would cease.

§ 9. The most significant decisions of the Labor Board have been those issued in the early summer of 1922 and concerned with reductions in rates of wages. They are significant because of the subject matter, and the treatment in the majority opinions; but most significant because the labor group dissented in terms which indicated a cleavage of opinion on the responsibility of the Labor Board.

These dissenting opinions are not friendly in their tone, and their language is sometimes in terms which might be interpreted as a prostitution of dignity for purposes of publicity. On few other grounds, save those of sheer anger, or the desire to be on record in the union publications, is such language as the following to be accounted for: reference to the "legitimate human needs" placed next to a reference to the food allowance of "convicts in the Cook County jail," the insistence that the majority had failed to consider "the real merits of the case," the use of the phrases "misrepresentation of the true facts," and "cynical disregard of

[1] "It is absurd to say that carriers and their employees would not be permitted to interrupt commerce unless the operation of the roads was turned over to contractors, in which event the so-called contractors and the railway workers might engage in industrial warfare *ad libitum*."

[2] Decisions No. 2, 119, 147.

[3] "No more important dispute has ever come before the Labor Board for adjudication. It goes to the vitals of the Transportation Act. If the carrier can legally do the thing which has been done under this contract, then the entire Transportation Act can be nullified and the will of the Congress of the United States set at naught. If one class of employees can thus be taken from under the application of the Act, there is no sound reason why each and every railroad employee in the United States cannot be given like treatment." Dec. No. 982, p. 8.

the obligation to inform the public," and the failure to differentiate between gross and net earnings in the statement that the carriers, with the exception of a few months in 1921, had been receiving "the largest returns in history." [1] The feeling that the dissenting opinions were written for organization consumption is strengthened by their reference to the statements that "reductions in hours are not to be regarded as increases in pay," that prewar wages were "the product of inequitable wage bargains," a day when the carriers bought labor "as a commodity at the lowest possible figures," etc.[2] The doctrinaire argument that because a freight carman had, in a previous opinion of the Board, been defined as a mechanic, he should be paid the minimum wage for mechanics, is also typical union logic.[3] It cannot be said, however, that the majority statement answering these dissenting opinions was entirely judicial in poise.[4]

The evidence introduced in the maintenance of way controversy had sought to emphasize a social responsibility to pay this class of labor wages based upon "human needs," for a family of

[1] See Dec. No. 1028; Dec. No. 1036; Dec. No. 1074.

[2] Dec. No. 1028, p. 26.

[3] Dec. No. 1036.

[4] In their statement of June 17, the majority said:

"It is not incumbent upon the six members of the board concurring in this decision to follow the minority into a partisan controversy which partakes more of the characteristics of impassioned advocacy than of calm adjudication.

"In so far as the dissenting opinion distorts the sentiments of the majority, misquotes their language and reflects upon their desire and disposition to do justice, we will refrain from comment. We prefer to believe that these improprieties crept into that part of the document which was drafted by the employees in the headquarters of the Railway Department of the American Federation of Labor, and that they were overlooked by the dissenting members. . . .

"It is something new for labor members of the board to issue incendiary arguments to employees in favor of striking against a decision of the board. The giving of advice of this kind has heretofore been left to outsiders, who were not under the official obligations imposed by the transportation act, the main purpose of which is to prevent railway strikes and protect the public from their dire effects. . . .

"Not only do the minority step down from the judicial position which they occupy to advise a strike, but they obviously distort and misconstrue the language of the majority in order to provide the condition which they pronounce a justification.

"This is not the only place in the dissenting opinion where the suggestion is made to the employees to strike. As a matter of fact the entire dissenting opinion constitutes a strained and exaggerated effort to inflame the employees by the belief that they have been grossly outraged by this decision."

Chairman Hooper's letter carried in the public press, June 21, 1922, an answer to a letter of President Jewell of the Shop Crafts, and contained such phrases as "not correct—misleading—strained—utterly baseless."

five. This evidence the majority did not accept as governing. The dissenting opinion, however, insisted that the Labor Board should act as a minimum wage commission in order that this level might be attained. The Australian Court of Conciliation and Arbitration was looked to for precedents, and generalities from the public addresses of "men of prominence," including the President and his Secretary of Labor, were quoted to indicate "the trend of the leading thought and opinion." The "saving wage" was emphasized. No such theory of wage fixing appears elsewhere in the American economic organization; it was not a governing element in the war-time wage adjustments; and its introduction into legislation must be quite revolutionary. If the American people are to single out one group of laborers in the community, those engaged in the transportation industry, and guarantee a minimum wage to them, with differential allowances for skill and experience, the break with the past is so clear that no body except one charged with that particular responsibility should assume it. The time may come for such a social experiment, but there is nothing in the history of the present law to indicate that such was within the intention of Congress in 1920.[1]

The doctrine that the "human needs" of the employees should govern the fixing of wage rates, though introduced into discussion of wages for the unskilled laborers, was extended to the wage rate discussion for skilled laborers. The new scales of wages fixed for common labor would, on typical roads, depending upon the locality, range from 23 to 35 cents per hour, if men could be found to work at those wages, i.e., the Labor Board fixed mini-

[1] The significance of their proposal did not escape the minority. In the Clerks' Case (Dec. No. 1074), dissent to which was recorded by Messrs. Wharton and Phillips, they said:

"The majority of the Board are, then, in a thoroughly insecure position, when they must depend for justification of their decision upon principles which either contradict the clear purpose of the Act under which the Labor Board is created or upon misinterpretation of fact. It is the opinion of the minority that such pitfalls could be avoided by a clear, sincere attempt to approach the problem of wages from the point of view of the humble worker who must spend his wages to support his family. Wage adjustment will be theoretical until statesmen appear with enough human sympathy to place themselves in the other fellow's position."

Previously they had said:

"Economic laws, which the majority felt to be so unchangeable, are neither God-given nor man-made; they are simply a description of the way in which business and industry have worked to date and it has worked out very badly for human life."

mum wage rates, not necessarily maximum wage rates.[1] To apply similar reasoning to the shop crafts, for whom base rates of 63 cents (car men) and 70 cents (mechanics) were specified, the discussion had to do with "a tentative standard of living expressed in terms of goods and services to which mechanics naturally feel themselves entitled." After all, the "natural" feelings of mechanics, when it comes to consumption of goods, are hardly likely to be different from the feelings of other members of the community. They are likely to expand as appraising a standard of living with an expansion of income. The silk shirt period was not in 1922 too far back to have passed from the average mechanic's memory.

The majority opinions were not without their surprises. The maintenance of way opinion contained some entirely new doctrine, subsequently reiterated:

> "The hazards and hardships of the employment, the training and skill required, the degree of responsibility to the public, and other elements mentioned in the statute (Transportation Act of 1920) combine to justify payment of a better wage to these employees than is paid to similar labor in outside employment."[2]

[1] The president of the shop crafts, Mr. Jewell, made wide use of the 23 cents per hour figure in his public statements especially during the period preceding the calling of the shopcraft strike. He was seeking to secure the adherence of the maintenance men, and the use of the 23 cent per hour figure was undoubtedly a bid for support. Chairman Hooper felt constrained to answer the assertion, which was contained in Mr. Jewell's letter to the Board:

> "Your statement that the board 'failed to take into consideration the principle that even the lowest paid railway employees, such as section men and laborers, should receive at least a living wage,' is utterly baseless. Your continual isolation and accentuation of the fact that a minimum rate of 23 cents an hour, $1.84 a day, was established for section men, is entirely misleading, because it overlooks or suppresses so many connected facts. . . . A comparatively small number of them receive 23 cents an hour. The 23 cent rate is found on a comparatively small number of divisions of a few roads in the South and Southwest. It is not even found on the Southern and Illinois Central which cut completely through the South. Where this minimum rate is found, the cost of living is usually low, and the men, in many instances, are furnished free living quarters. . . .
>
> "Based upon the cost of living, the purchasing power of the hourly wage of section men under the present decision is 44.5 per cent greater than it was in 1917, and 37.3 per cent great than in 1915. . . . If it be said that the ten-hour day prevailed in 1915, and the eight-hour day now, it may likewise be said that the men either get the benefit of the extra two hours for their own purposes or, in many instances, they will now be permitted to work the two hours, since punitive overtime has been abolished for this class of employees for the ninth and tenth hour."

[2] Dec. No. 1028, p. 10; see Dec. No. 1036; Dec. No. 1074.

The Board found that, after the reductions made under the decision, common labor would still be receiving, as a rule, a wage in excess of that paid to similar labor in other industries. The Board announced, also, a lack of "sympathy with the idea that a government tribunal, empowered to fix a just and reasonable wage for men engaged in serving the public in the transportation industry, should be controlled by the one consideration of the low wages that may be paid to other labor in a period of temporary depression and unemployment."[1] But the majority of the Board refused to accept the interpretation of the minority that the Board should act as a minimum wage commission. The majority opinions in the shop craft and clerks' opinions contained similar doctrine.

The maintenance leaders did not accept this ruling of the majority of the Board as final, and, in the opinion granting a wage advance, handed down in October, 1922, it was again necessary to consider the "living wage." This time the language of the Board was more vigorous. The living wage had been defined by its proponents as "a wage which will support a family of five in health and reasonable comfort, such family being assumed to consist of a husband and wife and three dependent children under sixteen years of age." The majority opinion called this "a bit of mellifluous phraseology, well calculated to deceive the unthinking." Mr. Wharton's dissenting opinion added little to his previous argument.[2]

When the shop crafts struck in July, the railroads recruited forces, and applied for injunctions, restraining the strikers from interference with operations. The Labor Board at first busied itself seeking to patch up an agreement, but when this proved impossible, recognized the situation by the resolution which "outlawed" the striking unions, and called for the formation of new organizations.[3]

[1] Dec. No. 1028, p. 10. The Board added: "It is but just to say that railway managers have indicated no desire for such a result."

[2] Dec., No. 1267.

[3] The Board's resolution closed as follows:

"Be it further resolved, that, if it be assumed that the employees who leave the service of the carriers because of their dissatisfaction with any decision of the labor board are within their rights in so doing, it must likewise be conceded that the men who remain in the service and those who enter it anew are within their rights in accepting such employment, that they are not strike breakers seeking to impose

It was immediately apparent that seniority rights, which the railroads had announced would be forfeited unless the men returned to their jobs by a date indicated in published notices, would be the most difficult element in any scheme of settlement. The railroad managers were on sound ground when they insisted that in any settlement the seniority rights of the men working should be recognized. Otherwise the incentive for men to remain at work in case of future strikes called in violation of the Labor Board rulings would be destroyed. The importance of a place high on the seniority list is the only insurance which the public and carriers have against unwarranted and ill-advised strikes. Men cannot be made to work, but, unless the system shall be changed, they should not expect advantages where they assume no responsibility. To restore strikers to a place on the seniority lists above the places held by union men who had remained at work or above new men hired meant bad faith on the part of the railroad managers, hardly to be condoned because of pressure exerted from high places.[1] At best it meant mere temporizing, and the public could better afford to fight out an essential question of principle than to compromise when a compromise really meant surrender. The railroad presidents in resisting pressure to compromise on this issue served a public interest.[2]

the arbitrary will of an employer on employees; that they have the moral as well as the legal right to engage in such services of the American public to avoid interruption of indispensable railway transportation, and that they are entitled to the protection of every department and branch of the government, state and national."

President Harding's Proclamation of July 12 included the following paragraph:

"The maintained operation of the railways in interstate commerce and the transportation of the United States mails have necessitated the employment of men who choose to accept employment on the terms of the decision (of the Labor Board) and who have the same indisputable right to work that others have to decline to work."

[1] Chairman Hooper of the Labor Board in his statement of July 3 said, "the men who remain in their positions and the new men who may come in will be protected by public sentiment and the full governmental powers."

[2] The comment of the Railroad Labor Board in the reopened maintenance of way wage case contrasted the course of the maintenance of way employees, "whose officials wisely prevented a strike," with that of the shop crafts:

"In the judgment of a majority of the Labor Board, and, we believe, of a great majority of the people, the shopmen's strike was an egregious blunder without any real justification, and this is said with the kindliest feeling for the employees who have suffered most from its effects.

§ 10. Time alone can tell the full story for the Labor Board as it told the story for the Interstate Commerce Commission. Not until 1906 did the latter possess affirmative powers, however much it had asserted claim to such powers. The future also holds the story of the coördination of the two bodies, for it is clear, from the nature of their operations, that such coördination there must be. No scheme of regulating wages and conditions of work could be an integral part of the scheme of rehabilitating railroad credit unless there is fair insurance that the mutual relations of the problems will be considered. The Act itself is silent on the question, except as a rule of implication may be invoked. In the Increased Rate Case of 1920, the Commission took cognizance of the increase in wages made by the Labor Board Order of July 20, 1920, and in calculating the amount of the needed revenues sought to insure earnings of $618,000,000 in addition to the amounts demonstrated as needed by the evidence presented in the hearings. In 1922 the two bodies announced decisions quite independently, the majority of the Interstate Commerce Commission acting over the protest of Commissioner Eastman who counseled delay until the Labor Board should have acted. In distinct phases of the work of rehabilitating the finances of the Missouri & North Arkansas, increasing revenues, and cutting costs, the two bodies operated, although quite independently.[1] These instances are typical of situations which, for individual roads, and for groups of roads, must be of importance in the application of the principles of the rule of rate making. Of necessity the Railroad Labor Board and the Interstate Com-

It has wrought harm to all and good to none. It has burdened the railways with an unjust expense, has inflicted great losses upon the public, especially the food producers, and has resulted in approximately $177,-535,524 loss to the strikers. For all this, the men on strike have won nothing. They have gained no concession as to any matter upon which they struck. For months the strike has been merely a struggle upon the part of the men to regain their positions."

Dec. No. 1267.

[1] The Labor Board, Dec. No. 724, approved a reduction of 25 per cent below the level set in its Dec. No. 147, the wage cut of 1921, with the understanding that no dividends would be paid on stock until the standard wage had been restored. The Interstate Commerce Commission decision on the financial condition of the Missouri & North Arkansas refers to the action of the Labor Board. Division of Joint Rates on the M. & N. A., 68 I. C. C. 47, 50; see also Reduced Rates, 1922, 68 I. C. C. 676, 688.

merce Commission must work in harmony. One or both cannot go it alone.[1]

[1] The President in his message of December 8, 1922 even suggested that the Railroad Labor Board be abolished, and that a labor division be created in the Interstate Commerce Commission. The President said:

"The substitution of a labor division in the Interstate Commerce Commission, made up from its membership, to hear and decide disputes relating to wages and working conditions, which have failed of adjustment by proper committees created by the railways, and their employees, offers a more effective plan. . . .

"This suggested substitution will involve a necessary increase in the membership of the commission, probably four, to constitute the labor division. If the suggestion appeals to the Congress it will be well to specify that the labor division shall be constituted of representatives of the four rate-making territories, thereby assuring a tribunal conversant with the conditions which obtain in the different rate-making sections of the country."

CHAPTER XXVI

THE INTEGRITY OF THE ACCOUNTS

§ 1. The relationship of accounting methods to the rehabilitation of credit arises from the circumstance that only if accounts are kept honestly, and in accordance with sound principles, can there be assurance that the earnings shown on the books are stated with as close approximation to accuracy as is possible. When the affairs of a single road are under examination, it is important also that the same methods of handling transactions on the books be used, in order that, from year to year, the data disclosed shall be comparable. The stockholder, presumably, is entitled to accurate and comparable information, as an owner of the business; and the owners of securities, who have claims on earnings in the nature of a fixed charge, are directly interested because both the safety of their principal and the surety of their income are dependent on showings of earnings. It is better to know the worst or the best, as the case may be, and to know it at once. Any system of accounting, therefore, demands rigorous intellectual honesty in its application, if it shall operate to rehabilitate railroad credit. Insurance of the integrity of the accounts is one way of creating confidence.

Since 1907, the railroads have kept their books in conformity with a system of accounts prescribed by the Interstate Commerce Commission. Prior to 1907, each road had kept its books upon its own plans. While there was, on many roads, uniformity of treatment of accounting transactions from year to year, there was not uniformity of treatment as between railroads, and therefore no strict comparability between the figures disclosed by the

books of different railroads, even in a single year. It is true, of course, that there was not a little uniformity, especially in the general scheme, arising because of the similarity of the problem on all roads, the transfer of accounting officers from one railroad to another, and conferences of accounting officials. Upon the fund of accumulated experience, the Commission's Statistician, the late Henry Carter Adams, drew freely, and in the formulation of the Commission's system of accounts, Professor Adams had the benefit of helpful coöperation and frank criticism from the membership of the Railway Accounting Officers' Association, an organization which dates from 1888. The foundations for a tradition of mutual helpfulness were laid at the beginning.

The inadequacies of railroad accounting systems prior to the development of the complete system by the Commission should not be assigned to ignorance or perversity on the part of railroad executives. Some of the then general practices, which would now be condemned vigorously by accounting officers, were thought to be the correct method of handling the transactions. After all, so long as the amount of net earnings was considered a matter of private business (or was so considered by railroad managers without legislative challenge) there was not great public concern in the exact statement of railroad earnings from year to year.[1] Actually the financial requirements of the road had much to do with the accounting practice. Those roads which were prosperous observed a conservative policy, and charged considerable amounts to operating expenses which, at the present time, under the mandatory classification, are properly chargeable to capital account. These railroads had made replacements when needed, and charged them, as well as net improvements, to operating expenses in a single year. Their bookkeeping was thus simplified by charges direct to operating expense (maintenance) in preference to creating depreciation reserves which should be written down with the making of replacements.[2] There have been cases, of

[1] It must be emphasized that access to the carriers' accounts and their uniform building up had been sought by the Commission as a means of discovering disguised rebate payments. Control of accounting methods was, therefore, originally sought as a part of the general campaign to insure collection of the published rate. It was not concerned with the rate of return, 19th Annual Report I. C. C. (1905), p. 11.

[2] Mr. A. H. Plant, then Comptroller of the Southern Railway, testified in 1916: "Before the depreciation account was born on the Southern

course, when a railroad has been brought up short by a neglected road bed, unusable cars, or worthless motive power. Then the failure to furnish adequate service has furnished the basis of the public interest, rather than the adequacy or inadequacy of the charges against earnings.

Maintenance accounts have also been within the control of the management. The amount spent for maintenance had, very largely, before the Commission's accounting system was established, been made to fluctuate with gross earnings.[1] And sometimes, when expenses had been pushing earnings pretty close during the first two-thirds of the year, maintenance was held over in the hope of an improved situation. If the situation was courageously faced, and the necessary "deferred maintenance" promptly made up, the comparative accounts for two succeeding years now appear obviously out of line. But, if the hoped-for turn in affairs did not materialize, the temptation to show further paper profits more than once proved too much. All too frequently the courage was lacking and the road drifted into bankruptcy, a receivership, and a period of physical rehabilitation during which the operating expenses ate up the earnings at an inordinate rate. There have even been cases when a non-payment of dividends has accompanied a low standard of maintenance over a period of years, and cases where dividends have been suspended in order to keep up the property. The number of properties is so many, and the conditions faced so variable,

Railway, we realized the necessity for taking care of our maintenance and retirements, and we really had in practice a depreciation not determined, however, as scientifically as subsequently determined by the Commission. When we retired a car on the Southern, we charged the cost to replace it with a modern car to operating expenses, and in that way we did practically what we are now doing under the Commission's rule. I was quite anxious . . . to see how the two methods agreed, and I went back and applied the Commission's rule to a period back of the time it was promulgated, and compared it with the results under the Southern old method, and it surprised me to find the results were very nearly the same." Valuation Hearings, I. C. C., March, 1917, p. 843.

[1] Five Per Cent Case, 31 I. C. C., 350, 380. There the Commission said: "One of the executives, testifying in the case, said, in effect, that he regarded dividends as practically a fixed charge that ought not to be reduced, and that it had been his policy to make the maintenance accounts fluctuate with the gross earnings." See testimony of Mr. Daniel Willard, *Evidence, Five Per Cent Case*, Sen. Doc. No. 466, 63d Cong., 2d Sess., pp. 5677, 5686, 5709. Mr. Willard was chairman of the committee of railroad executives in charge of the presentation of the carriers' case.

that it is quite impossible to generalize and yet not to think of exceptions to the general statement.

§ 2. By detailed regulations, supplemented by inspection, the Interstate Commerce Commission seeks to minimize the possibility of control of accounts by executive officers. Indeed, it has been the Commission's aim from the first to hold the individual accounting officer responsible to the Commission. In 1914 the language of the Commission was pointed:

> "The formative period . . . must now be considered as having come to an end so far as all the important principles . . . are concerned, and we shall hereafter expect a more exact observance of the prescribed accounting systems by the carriers and their officials. . . . Irrespective, however, of the influences brought to bear upon an accounting officer to turn him from his true course as an accountant and from his duty under the law, of keeping the accounts in accordance with the system prescribed by the Commission, it is nevertheless his hand, or the hand of someone immediately under his authority, that makes the wrongful record, and it is the accountant, therefore, . . . who is immediately responsible and whom the Commission will first hold responsible when it becomes necessary to invoke the penalties of law; but we shall not hesitate to call to account, with even greater severity, anyone above the accounting officer in authority who may share in the responsibility for any violations of the accounting rules and regulations which have been prescribed for the use of the carriers that are subject to the Act."[1]

This statement of policy clearly places the railroad accountant under a dual responsibility: a responsibility to the executive officers and the board of directors for carrying out instructions, and, on the other hand, a responsibility to the Commission for an observance of its rules. If the instructions from a superior officer conflict with the rules of the Commission, as he understands them, he must obey the rules or stand ready to accept the consequences. His public responsibility he cannot shift. The certainty of such an extension of the control over accounts, should have been anticipated when rate advances were sought on a basis of an insufficiency of earnings. And now a rule of rate making and the contemplated recapture of earnings render more important both soundness of accounting analysis, and allocation of charges, and also uniformity of practice in accounting for certain classes of expenditures, notably for maintenance, or in handling such book adjustments as those made of current

[1] St. Paul and Puget Sound Accounts, 29 I. C. C. 508, 518.

wastage of physical assets—depreciation. Indeed, the key to the regulation of management lies in the regulation of accounts.[1]

§ 3. Especially does the recapture of excess earnings clause emphasize current transactions rather than past performance. The rule of rate making, recognizing the necessity of "reasonable expenditures for maintenance of way," calls for "honest, efficient, and economical management." But what is reasonable is a matter of judgment, and the line is not always easily drawn between sound economy and wasteful economy. "Efficient" men sometimes make "honest" mistakes. The reason is clear, therefore, why it will be difficult for the Commission, charged with an interest in these details of management which govern standards of maintenance and performance, to stop at mere supervision and inspection of accounts.[2] The function of the interstate Commerce Commission would, indeed, seem destined to look deeper into the work of management, to be especially one of supervising and watching standards. This condition the Transportation Act provided for in part when it granted the power to the Commission to prescribe the classes of property for which depreciation may properly be included under operating expenses, and to fix the depreciation charged. But the Commission's reports in the cases concerning the construction and repair of railway equipment, and especially the dissenting opinions, illustrate how difficult it must be to draw a clear line of distinction between mere supervision and interference with management,

[1] Mr. L. F. Loree is authority for the following:

"In putting into effect the accounting rules made effective in July 1, 1907, the Commission's Statistician, Mr. Henry C. Adams, called together the accounting staff of the Commission, and, among other things, said to them:

> 'The Government has recently undertaken to do something quite different from that which it has ever undertaken to do before. It has undertaken to exercise a controlling influence upon the administration of railway properties through the agency of their accounts.
>
> 'The aim of the supervision of accounting is to exercise influence upon the administration and management of railway property.' "

Address at the 1921 meeting of the Railway Accounting Officers' Association.

[2] Before 1920, the Commission's accountants made examinations of carriers' accounts rather as a matter of routine check, to insure that the requirements of the regulations were understood, though there have been some examinations seeking to explain an emergency situation—a collapse of service or insolvency under mysterious circumstances, in which there has been attempt to go behind the figures. The work in this latter class of examinations has been essentially of the nature of historical research.

and yet not to step over that line.[1] The operation of the recapture clause, once it is made to work, will call for much frank interchange of ideas and for much coöperation—neither of which happy conditions are likely to obtain until the full meaning of the law has been demonstrated through adjudication.

§ 4. It is not mere accident, then, that these two categories of railroad expense, maintenance and depreciation, are singled out for special mention in the law. Their importance is due to the basic economic peculiarity of the railroad business—the presence of a large investment in fixed plant and equipment of a semi-permanent nature. And their amounts are, at least over short periods, under the control of the railroad management.[2] A railroad undermaintained over a period of years is almost certain to reach a point where physical rehabilitation on a considerable scale is required; a railroad which possesses worn-out equipment against the cost of which an inadequate depreciation reserve has been built up finds itself with assets dissipated, whose writing off must appear as a charge against current earnings, though the service has been performed in a series of previous years. Unwillingness to shrink current earnings by such a charge, and carrying the worn out equipment as a part of the plant inventory is a vicious practice likely to be resorted to when adequate charges to depreciation have been ignored so that

[1] Construction and Repair of Railway Equipment: Pennsylvania R. R. Co., 66 I. C. C. 694; Atlantic Coast Line R. R. Co., p. 727; New York Central R. R. Co., p. 732; Chicago & North Western Ry. Co., 69 I. C. C. 143; Seaboard Air Line Ry. Co., 69 I. C. C. 151.

[2] The maintenance problem resulted in one of the bitterest controversies arising out of the period of government operation. The Federal Control Act, upon recommendation of the President, included a pledge to return the properties to their owners "in substantially as good repair and in substantially as complete equipment as it was at the beginning of Federal Control." The railroads very generally contended that their properties were returned to them "undermaintained." All in all there was little tendency even on the part of the Railroad Administration, to deny the fact of undermaintenance; the controversy centered around its extent. The railroads claimed that a mere spending of a sufficient sum to pay for as many days of labor as could have been bought at pre-war wage levels during the test period was not keeping the solemn pledge made by the President. Wartime labor was notoriously inefficient; inexperienced labor substituted for experienced labor, women and boys for men, old men for young men. Piece work had been abolished. The Commission,—Maintenance Expenses under Section 209, Fin. Docket No. 1176, decided July 12, 1921, 70 I. C. C. 115—held that the difference in the "cost of labor," as those words appeared in paragraph (c) of that section of the Transportation Act, did "not include changes in the quality or effectiveness of labor, but only changes in wages," thus ruling against the carriers.

a sufficient reserve has not been built up, especially if reported earnings are running close to the danger mark.

Accounting for depreciation and for maintenance is, then, the really ticklish job. A high standard of maintenance on one road may mean a low depreciation rate, whereas a fixed standard on a lower scale on some other road which serves to keep the equipment in equally good running shape may mean a higher rate. It is the purpose of sound accounting to disclose the truth as exactly as may be. For a correct statement of current earnings, maintenance should be neither deferred nor anticipated without proper notice appearing upon the carrier books, nor may depreciation be understated. The spending on maintenance of more than actually needed to offset wear and tear means an actual betterment or addition charged to operating expenses—a hidden increase of investment, and, by so much, an overstatement of operating expenses.[1] It would seem, therefore, that such an amount, to the extent ascertainable, would properly be taken

[1] In 1916 a general investigation showed that some roads were carrying in their property accounts the costs of locomotives which had been in disuse for years or had actually been disposed of.

The Commission indicated that most of the roads had satisfactorily adjusted their accounts and that it was expected that the others would do so. The spirit of coöperation was remarked upon: "It may be said that most accounting officers of carriers are now in full accord with our accounting regulations, and are inclined to welcome examinations as assisting them in keeping their accounts properly." 30th Annual Report I. C. C. (1916), p. 39.

See A. S. Dewing, "The Position of Income Bonds, as illustrated by those of the Central of Georgia," *Quarterly Journal of Economics*, Vol. 25, p. 396, and especially his "Financial Policy of Corporations," Vol. 5, p. 145: "As a result of the reorganization the company was burdened by three issues of income bonds, preceding a relatively small issue of stock . . . $5,000,000 . . . controlled over $40,000,000 of securities. Obviously, it was to the interest of the common stockholders to build up the physical condition of the road by deflecting earnings to betterments. This could be accomplished by surreptitiously charging such betterments to the ordinary maintenance accounts. As a result little or no margin would appear to remain, after the payment of fixed charges, to apply to the contingent charges on the three income bond issues. And as these charges were not cumulative, the management could gradually build up the road from money that ought to have been paid to the income bondholders. This is exactly what was done. The earnings of a subsidiary steamship company were deflected to capital account, the maintenance charges were increased to an amount well above those of other southern roads and far above the average for the country as a whole . . . Court proceedings were brought against the management to force the admission of secret earnings, and the payment of the full income on all the income bond issues." The Court found, for 1907, total net earnings of $1,323,934 as compared with the management's figure of $461,030. The interest on the income

into account in measuring the adequacy of the carrier income. Deferred maintenance, on the other hand, would mean an inflation of apparent earnings: a situation much less likely to arise except in an emergency period, now that the recapture clause is operative. Certainly the Commission will have considerable difficulty in determining the standard by which to measure the adequacy of maintenance. Charging unduly large amounts, or failure to charge sufficiently large amounts, to take account of accruing depreciation would show, in the one case, an apparent scaling down of earnings, in the other, an inflation.[1]

§ 5. In the railroad business abandonments must ultimately be made for one of two reasons: (1) because the piece of property is physically worn out; or (2) because it is out of date. Railroad plant may become "obsolete," either when a competitor offers better service because of better and newer facilities and standards, or when substitute equipment does the work so much more cheaply as to make new installation, net economy. Not all parts of the railroad plant have the same useful life; where changed operating requirements have not caused relocation, there is road bed in use which was graded before 1840; but the character of the superstructure has changed with successive waves of improvements: just as has the character of the rolling stock. The DeWitt Clinton and its train, housed in a gallery of the present Grand Central Station in 1921, told an eloquent story. It is none the less true that the current charge made because of physical wear and tear is susceptible of more definite calculation than the charge made because of inadequacy or extravagant service demands. A mere percentage allowance, based upon the estimated natural life, is usually sufficient to take account of depreciation proper. No such simple device suffices to take account of obsolescence. He would have been a rash man, indeed, who would have ventured to prophesy the exact course of improvement in railroad plant and equipment when the Bessemer process of making steel was first revolutionizing

bonds, $750,000, had been earned and more than earned. The Illinois Central control of the Central of Georgia in 1909 resulted in retiring the income bonds.

[1] Five Per Cent Case, 31 I. C. C. 350, 377; the right of a railroad to make improvements from earnings was an essential issue in Central Yellow Pine Asso. *v.* I. C. R. R. Co., 10 I. C. C. 505; Illinois Central R. R. Co. *v.* I. C. C., 206 U. S. 441, 462.

standards. He would be a brave man now who ventured to prophesy the exact course of railroad engineering practice and standards in the future. One obvious illustration suggests itself: if terminals in large cities are to be electrified, investments useful only for steam operation—but still useful—must be scrapped, and in anticipation of this probable end, current charges should take cognizance of this almost certain shortened life of the existing plant. Otherwise, when the replacement does take place, net earnings in that year must be cut down an undue amount. The expedient of the Commission's accounting system, permitting the carrier, when a depreciation reserve has not been accumulated, to charge off the cost of large properties, abandoned, by spreading the charges over a period of years in the future, is obviously a "practical" compromise with principle.[1] Obsolescence should be provided for as it accrues, by regular charges against earnings. Current net earnings will be overstated unless this is done. How the end to be accomplished can be accomplished satisfactorily by accounting adjustment it is difficult to say. Doubtless the Commission will be forced to turn to the judgment of the railroad managers for guidance.

§ 6. The possible inadequacy of charges to maintenance account, and the omission, in the past, of charges for much of the depreciation and obolescence regularly accruing, directs attention to the present railroad surplus accounts. If, in the past, net earnings were actually overstated, even despite honest effort to charge the amount necessary to measure the accruing depreciation,—either by neglect of maintenance or omission of proper reserves—any addition to surplus was in that year unreal. On the other hand, when net additions to investment were made, perhaps in accordance with the rule of thumb, "a dollar ploughed in for every dollar of dividends," while accounting for the expenditures by direct charges to operating expenses, a secret surplus was created which the book figures failed to state. In many instances, therefore, the surplus is at best merely a misnamed depreciation and obsolescence reserve; in others, it represents net additions and betterments.[2] Mere inspection of the accounts

[1] Kansas City Southern Ry. Co. *v.* U. S., 231 U. S. 423.

[2] See the discussion by Mr. Prouty, correct in its fundamentals, though not entirely clear in statement, Advances in Rates—Eastern Case, 20 I. C. C. 243, 271.

cannot tell the whole story. Presumably the ascertainment of the fact is one of the ends to be achieved by the Federal Valuation, though, on account of the nature of that investigation, it is not clear exactly how the end will be achieved.

The property investment account is another balance sheet item which possesses a questionable character because of the inadequacy of past accounting practice as regards maintenance, depreciation, and surplus. Had the original investment entries been adequate, these causes would have thrown them out of gear, and the necessity for the valuation, as a starting place for the enforcement of the new policy of regulating management through control of earnings, would be just as real as it is now. But the original investment accounts frequently made only a formal pretense at reality. Too often they have been hardly more than the original journal entries necessary to balance the par value of the securities. The stock bonus was frequently the only bait whereby investors could be tempted to buy bonds. New lines were taken in exchange for stocks and bonds and their cost shown as the par of the securities given; sometimes such exchanges were effected through payments to construction companies or syndicates. Bond discount has sometimes been permanently capitalized instead of being amortized, frequently because of the necessity to "hold" every cent of apparent earnings. Sometimes, on the other hand, lines have been picked up at bankrupt sale, below cost to build, and included in the accounts at cost of acquisition. And, though, in receiverships, the important problem has been to scale down fixed charges, the old time practice of giving security holders stocks and bonds of greater par value (but with interest promised only on the underlying issues) on surrender of their securities, has, in recent years, been abandoned.[1] Recent reorganizations have shown a tendency to cut down capitalization as well as fixed charges.[2]

[1] There was nothing wicked about "stock watering" of this character. Investors were "taking their losses" and the scheme represented sound *private* finance in that it cut down fixed charges and created a solvent company in place of an insolvent one. In the middle 90's, it was not realized that regulation, then but feebly effective in the field of rate making, would, in fifteen years, be concerned with management and earnings, and that a public interest in the amount and character of the investment account, would have general recognition.

[2] A. S. Dewing, *Financial Policy of Corporations*, Vol. 5, p. 160. In the Kansas, Oklahoma & Gulf reorganization, approved by the Commission,

The Valuation Act directs that the Commission report revised and corrected valuations to Congress at the beginning of each regular session. Whether or not these revised valuations will be merely the "final value" as fixed for the valuation date, plus any net increase in investment as shown by the accounts, it is too early to say. If administrative convenience is to be consulted, this would seem the simplest procedure. Such was the procedure in the Reduced Rate Case of 1922.[1] Exactly how this action could be made to square with the vague generalizations about unearned increments, as lands, especially terminal lands become more valuable, is difficult to see. But rigid adherence to logical analysis is not an outstanding characteristic of valuation procedure. In any event it will probably require another Supreme Court opinion before the carriers and the Commission can stand squarely upon any agreed basis.

§ 7. In one detail the Transportation Act was specific: whenever, in the future, there are railroad consolidations, the par value of the securities of the new corporation may not exceed the value of the properties consolidated, as determined by the Commission. Exactly how any process of scaling down outstanding capital stock is to be effected is a detail for future administrative authorities to handle. But, since a share of stock, in spite of the dollar mark which appears on its face, is merely a share of ownership, the key to the difficulty may be a greater use of stock of no par value, carried on the books at a figure necessary to force a balance when all other items have been adjusted on a basis agreeable to the parties to the transaction.[2] The substitu-

Jan. 17, 1921, there was a scaling down both of fixed charges and of outstanding securities. The new company was incorporated for some $21,000,000, the old for nearly $35,000,000. 65 I. C. C. 672, 675.

Examination of the figures for other recent reorganizations shows the same tendency:

	Capitalization		*Fixed Charges*	
	old	*new*	*old*	*new*
Pere Marquette	$108,325,129	$105,000,000	$4,492,256	$2,352,476
Chicago & Eastern Illinois	94,204,446	91,035,750	3,759,996	2,237,051
Missouri, Kansas & Texas..	248,095,000	182,320,000	7,429,376	5,837,869
Denver & Rio Grande	87,775,670	57,927,207	8,078,619	7,596,169

[1] 68 I. C. C. 676, 684.

[2] Capital stock without par value has been approved by the Commission: Stock of Denver & Rio Grande Western R. R. Co., 70 I. C. C. 102; Stock of El Paso & Southwestern Co., 70 I. C. C. 208.

tion of stock of no par value, once the basis of exchange is agreed upon, as between the owners of shares in the properties to be consolidated, should satisfy the requirement of the law, and make more easy the bringing of the "value" of the properties into coincidence with the investment account. Similar readjustments, regardless of consolidation, should be encouraged especially when and if it is determined that the valuations which shall be used in administering the rule of rate making are to be kept up to date by rigid adherence to proper accounting methods, and not by new appraisals and new independent findings of "final value." Then the accounts will be the official source of information both on "value" and the earnings accruing—the basis of any calculations seeking to determine the existence of earnings to be recaptured for the public. In this very real sense, therefore, control over accounting is the key to the regulation of management.

CHAPTER XXVII

RAILROAD CONSOLIDATION

§ 1. The ultimate goal of the regulation of management as provided in the 1920 law is the consolidation of the railroads into a limited number of systems. The Transportation Act, as passed, provided only for voluntary consolidations; Senator Cummins was disappointed in his desire to have a mandatory consolidation program adopted. But the general aim of the policy is clear: the erection of competitive railroad systems which, with uniform rates, shall each earn substantially the same rate of return upon the value of its property. The work of the government in dissolving the Great Northern-Northern Pacific, Southern Pacific-Union Pacific and New Haven-Boston & Maine combinations by resort to the Anti-Trust Law, is not to be undone automatically; nor is the influence of these dissolutions in leading the Pennsylvania to withdraw from the Baltimore & Ohio and Chesapeake & Ohio, or the New York Central from the Nickel Plate to be lost.

Thus the proposal is not revolutionary in its principal implications; nor is it necessarily a reversal of public policy. The Interstate Commerce Commission is adjured, in the development of its plan for consolidations, to preserve competition "as fully as possible."[1] There is nothing in the consolidation

[1] However, the Commission has said, interpreting these words:

"Congress intended to permit unified operation, even if involving the elimination of competition, where this would be in the public interest, and provided for a modification of the anti-trust laws to the extent necessary to effect this purpose, stating certain prerequisites, and imposing upon the Commission the duty of determining whether or not . . . the proposed arrangement is in the public interest." Lease of Valley Terminal Railway, 65 I. C. C. 105, 109.

provisions of the Interstate Commerce Act to the effect that the functioning of the Commission under it is to be limited by the Sherman Anti-Trust Act. In fact, one of the first specific proceedings in which the authority of the Commission to consolidate particular railroads was sought, considered the application of the Southern Pacific Company to retain the Central Pacific, although a decision of the Supreme Court had required the dissolution of these two companies on a suit by the Government under the Anti-Trust Act.[1]

§ 2. The law, then, rather seeks the extension of a process which a changed economic and strategic condition has slowed down. A succession of voluntary consolidations dating back even before the formation of the first New York Central in 1853 had already brought approximately 80 per cent of the railroad mileage into 30 systems, earning about 90 per cent of the gross revenue. The pioneer railroad organizers soon learned that a railroad was a business into which it was frequently necessary to put additional funds to protect the property. If one of two competitors at a common terminal secured control of the only "end to end" connection, the other either had to build an extension or withdraw from through business, except for such crumbs as fell to it. The Western Pacific building followed the Union Pacific-Southern Pacific merger, and the St. Paul extension followed the joint control of the Burlington by the Great Northern and Northern Pacific. These are but recent grand examples of what always took place as the railroads moved west from the original termini of the trunk lines (Buffalo, Dunkirk, Pittsburgh, Wheeling) to Toledo, Chicago and the Missouri River. The network of branch lines in Kansas and Nebraska is the result of the competitive building during the 80's by the Santa Fé, Union Pacific, Missouri Pacific and Burlington. Control by the Lake Shore (the Chicago-Buffalo "end to end" system line of the New York Central) of the old Cleveland, Columbus, Cincinnati & Indianapolis, and the connecting lines to St. Louis and Peoria of the present "Big Four," was the answer of the Vanderbilt interests to the strategic location of the already closely knit Pennsylvania. And this achievement of a St. Louis entrance by its principal connection cut the Wabash off from business orig-

[1] United States *v.* Southern Pacific Co., 42 Sup. Ct. Rep. 496.

inating or destined east of Buffalo, and forced the Wabash to seek means of reaching that important interchange point. Sometimes control of a key line, such as the Richmond-Washington line, the Richmond, Fredericksburg & Potomac,[1] or control of a belt or terminal road in an important city,[2] or control even of a water line extension, has been vested in a group of competitors and connections.[3] The considerations governing the cooperative actions of the railroad managers concerned were considerations of railroad strategy.

This competitive occupation of the country took place very largely before 1900. After 1900, not only was the competitive spur which had forced the building of extensions no longer effective, but there was a less impelling motive for expanding existing facilities to create new traffic, since the railroads now had all the business they could handle. Except in isolated portions of the West the net work of railroad lines was complete. Then came the consolidation movement of the first years of the century, which, while responsible for the two Pacific Coast extensions, in general slowed down the work of the new building.[4] This consolidation movement was a merger of competitors: perhaps actuated in part by greed for power, but, fundamentally, due to

[1] The R. F. & P. is controlled by a holding company owned, one-sixth each, by the Pennsylvania, the Baltimore & Ohio, the Southern, the Atlantic Coast Line, the Seaboard Air Line, and the Chesapeake & Ohio; the Lehigh & New England is owned by the Central of New Jersey, the Lackawanna, the Erie, the Lehigh Valley and the Pennsylvania; the Northwestern Pacific by the Southern Pacific and the Santa Fé; the Burlington and the Spokane, Portland & Seattle, by the Great Northern and Northern Pacific; Consolidation of Railroads, 63 I. C. C. 455, 506, 554, 569, 573, 605.

[2] Typical illustrations are here the Chicago & Western Indiana, which gives the owning companies and certain tenant companies, notably the Santa Fé and Chesapeake & Ohio, entrance into Chicago, owned jointly by the Chicago & Eastern Illinois, the Wabash, the Grand Trunk, the Erie and the Chicago, Indianapolis & Louisville. The St. Louis situation was not cleared up until the Supreme Court opinion, defining the rights of proprietary and tenant companies, U. S. *v.* Terminal R. R. Asso. of St. Louis, 224 U. S. 383.

[3] Thus the various roads having terminals at Norfolk have been jointly interested in the Old Dominion Steamship Company, the Virginia Navigation Company, the Chesapeake Steamship Co., and the Baltimore Steam Packet Co. Steamer Lines Norfolk to Baltimore, 41 I. C. C. 285.

[4] The Puget Sound extension of the St. Paul was due to the close alliance of the Great Northern and the Northern Pacific and their joint control of the Burlington; the building of the Western Pacific was due to the bottling of the Denver & Rio Grande at Salt Lake City and Ogden when the Salt Lake Route, the Central Pacific, and the Oregon Short Line came under the common management with the Union Pacific.

the desire to control rate cutting which resulted from the competition by end-to-end consolidations which had built up long haul systems. It was the public distrust of this movement which culminated in the dissolution suits. The Supreme Court opinions in the Northern Securities Case, and later in the Union Pacific-Southern Pacific Case then insured that competition, at least over long distances, would be enforced.[1] This same policy it is the object of the present law to continue: "competition shall be preserved as fully as possible." The consolidation scheme must seek, therefore, to outline mergers of connections, primarily, and to a limited extent, only, mergers of competitors. Merger of connections should result rather in intensifying competitive influences than in their curtailment.

§ 3. A second general rule limiting the exercise of discretion by the Commission is related to the first: "the existing channels of trade and commerce shall be maintained." Obviously competition can be most effective when the main flows of traffic are recognized. These are by now well defined: east and west in the territory north of the Ohio and Potomac Rivers—"Official Classification Territory"; parallel to the coast and the mountains, between the North Atlantic Seaboard and the South, parallel to the Mississippi between Chicago, St. Louis and the Ohio River Crossings to the Gulf—"Southern Classification Territory"; and along radiating lines south and southwest, west and northwest from Chicago and St. Louis—"Western Classification Territory." From the Twin Cities and Duluth, as from the Missouri River Crossings, the main lines of railroads extend east and west, passing through intermediate jobbing centers, Denver, Butte and Salt Lake on the way to the Coast. At Kansas City, railroads concentrate, bringing in export grain, which can move to the Gulf at Galveston, Port Arthur or New Orleans in competition with the ports on the Eastern Seaboard. Between the West and the East

[1] The Supreme Court opinion in the Northern Securities case is Northern Securities Co. *v.* U. S., 193 U. S. 197; in the Union Pacific Case, 226 U. S. at pp. 64 and 470. Commissioner Meyer, then Professor at Wisconsin, wrote an extended discussion of the Northern Securities opinion, *History of the Northern Securities Case.* Stuart Daggett, *History of the Southern Pacific,* contains interesting chapters on the Sout ern Pacific–Union Pacific Case; his "Judicial Proceedings for the separation of the Central Pacific and Southern Pacific Lines," *University of California Chronicle,* October, 1922, discusses the consolidation problem.

there is a flow of raw materials, the products of mines, forests and agriculture and food stuffs, including fruits exchanged for manufactures; between the South and East the exchange is primarily one of cotton, lumber, fruits and vegetables for manufactures. The character of the flows of traffic is necessarily governed by the specialized production in the different sections and varies with the character of that production. But their general direction is pointed by figures of interchange between existing lines of railroad whenever long haul competitors are disclosed on the map.[1]

§ 4. These clearly discernible groups of competitors consist of both strong and weak systems. This differentiation is based upon no single ground of distinction. The weak roads, like the strong, have been built up by consolidation; but for one reason or another, they have been unable to improve their lines, or their strategic position. Sometimes traffic density is low because the facilities are poor; sometimes the facilities are poor because traffic density is low. Some lines are weak because the principal source of traffic has been exhausted. That has been the story of Colorado and Nevada lines.[2] The salvation of the Pere Marquette and the Ann Arbor, and their independent "cross lake" complement, the Green Bay & Western, has been a heavy bituminous coal tonnage handled via car ferry. Lumber traffic is no longer important. Some lines run counter to the normal flow of traffic in a highly competitive territory: such is the case of the Minneapolis & St. Louis; or have only circuitous routes for through business: the case of the Chicago Great Western. Other roads are weak because the effects of a recent period of competitive overbuilding are still felt. In the Southwest, there was not yet enough traffic to go around, and the old lines suffered with the new. A further characteristic of most "weak" systems is a dependence upon connections, which are also competitors, for entrance to important traffic originating and interchange points.[3]

[1] For figures of interchange, maps, etc., see Consolidation Case, pp. 492, 510, 573, 591.

[2] Not a few of the lesser Colorado lines have been scrapped with the exhaustion of mining, and the rise in the general price level making gold mining unprofitable. The collapse of the Goldfield boom is discussed by the Commission: Goldfield Cases, 34 I. C. C. 360.

[3] The strategic weakness of the Wabash lies here, and of the Texas & Pacific, of the Atlanta, Birmingham & Atlantic, of the Kansas City, Mexico & Orient, of the Western Maryland, and of the Alton. Consolidation of the

Usually it is the last built system of a group of competitors which is the "weak line," especially when it has found the task of securing adequate terminals extremely costly. And a characteristic of all is that a large proportion of the earnings is absorbed by fixed charges. Assured solvency is the final test of strength.

§ 5. The report of the Commission containing its tentative plan was made August 3, 1921. The Commission stated in its report that this tentative plan was being put forward "in order to elicit a full record upon which the plan to be ultimately adopted can rest, and without prejudgment of any matters which may be presented upon that record." It constitutes a starting point for future hearings and negotiations, but it is a bare skeleton presented without comment. In general, although not in all details, it follows a report made to the Commission by Professor William Z. Ripley.[1] One of the important exceptions is the placing of the Denver & Rio Grande and the Western Pacific in the Santa Fé system. Professor Ripley had placed these two roads in the Burlington-Northern Pacific system.[2]

The Commission's plan recognizes the essential economic unity of the three main classification territories, just as did its opinions in the cases involving general rate levels. The systems, which it proposes, break at the Ohio and Mississippi River crossings, or Chicago, and, with the exception of the Michigan and New England systems, isolated because of peculiar economic and geographical conditions, extend to tidewater on either coast, or the Gulf. In general, the Commission's plan, in contrast with that of Professor Ripley, did not propose the dismemberment of systems.[3] Still the anomalous position of the Wabash, bridging between Buffalo and the Missouri River, is recognized by a division of that system at the Mississippi between the Union Pacific and Erie, giving each a St. Louis entrance. The Colorado & Southern lines the Commission proposes to divorce from the Burlington, the Toledo & Ohio Central, from the New York Central. But the branch of the Illinois Central, Chicago-Omaha,

Toledo, St. Louis & Western with the Nickel Plate promises to place both roads in better strategic position.

[1] Consolidation of Railroads, 63 I. C. C. 455. Professor Ripley's report is reproduced as the Appendix, pp. 465–646, with numerous maps.

[2] *Ibid.*, pp. 642, 566, 568.

[3] *Ibid.*, p. 481.

originally strategically important for the Union Pacific which was dependent on east-end connections at Omaha, is left with the Illinois Central by both Professor Ripley and the Commission.[1] On the other hand, the Monon, originally important for the Southern and Louisville & Nashville, the controlling interests, as an entrance into Chicago, in direct competition with the Illinois Central, and thus permitting them to participate in the rate making conferences of their northern connections, has been assigned to the Baltimore & Ohio.[2] Similarly, the Vicksburg, Shreveport & Pacific, now a part of the Southern, is assigned to a system on the west bank of the Mississippi;[3] but the Memphis-Birmingham line of the Frisco is left with its present owner.[4]

All told nineteen systems are proposed:

OFFICIAL CLASSIFICATION TERRITORY.

A. Trunk Lines.

1. Pennsylvania.
2. New York Central
   (to include Western Maryland; possibly to include Boston & Maine, Maine Central and Bangor & Aroostook).
3. Baltimore & Ohio-Reading
   (to include Monon and Cincinnati, Indianapolis & Western; possibly to include New Haven).
4. Erie-Lackawanna-Wabash.
5. New York, Chicago & St. Louis (Nickel Plate)-Lehigh Valley
   (to include Toledo, St. Louis & Western, Lake Erie & Western, Wheeling & Lake Erie, Pittsburgh & West Va.).

B. Regional Lines.

6. Pere Marquette-Ann Arbor
   (to include Detroit, Toledo & Ironton and Detroit & Mackinac).
7. New England System: New Haven-Boston & Maine-Maine Central.
   (possibly to include Lackawanna, Buffalo, Rochester & Pittsburgh, and Delaware & Hudson, to make up a New England-Great Lakes System).

[1] Professor Ripley even assigned "considerable weight" to "historical considerations" in justifying leaving this branch with a carrier whose main traffic flow is north and south.

[2] *Ibid.*, pp. 457 and 490.

[3] *Ibid.*, pp. 463 and 603.

[4] *Ibid.*, pp. 463 and 549.

C. Hampton Roads-Great Lakes.

8. Chesapeake & Ohio-Virginian.
9. Norfolk & Western-Toledo & Ohio Central.

SOUTHERN CLASSIFICATION TERRITORY.

10. Southern.
11. Atlantic Coast Line-Louisville & Nashville (to include Richmond, Fredericksburg & Potomac, Norfolk Southern, Atlanta, Birmingham & Atlantic, and Florida East Coast).
12. Illinois Central-Seaboard Air Line (to include Gulf & Ship Island, Tenn. Central, Carolina, Clinchfield & Ohio).

WESTERN CLASSIFICATION TERRITORY.

A. Transcontinental:

13. Union Pacific-Chicago & Northwestern-Wabash.
14. Chicago, Burlington & Quincy-Northern Pacific (to include Chicago Great Western, Minneapolis & St. Louis, and Spokane, Portland & Seattle).
15. Chicago, Milwaukee & St. Paul-Great Northern (to include Duluth & Iron Range; Duluth, Messabe & Northern; Butte, Anaconda & Pacific, Spokane, Portland & Seattle).
16. Santa Fe-Colorado & Southern-Rio Grande-Western Pacific.
17. Southern Pacific-Rock Island (to include El Paso & S.W., Trinity & Brazos Valley, Midland Valley, Vicksburg, Shreveport & Pacific, Chicago, Peoria & St. Louis).

B. Southwestern:

18. "Frisco-Katy-Cotton Belt" (to include in addition to St. Louis-San Francisco, Missouri, Kansas & Texas and St. Louis Southwestern, the Alton, and Louisiana Ry. & Nav. Co).
19. Chicago & Eastern Illinois-Missouri Pacific (to include Kansas City Southern, Kansas City, Mexico & Orient, Texas & Pacific, International Great Northern and Gulf Coast Lines).

The general bases of these system allocations, and the principles governing their make-up, will now be indicated.

§ 6. In Official Classification Territory, the problem is fundamentally that of creating systems which can meet the Pennsylvania and New York Central upon something like an equally

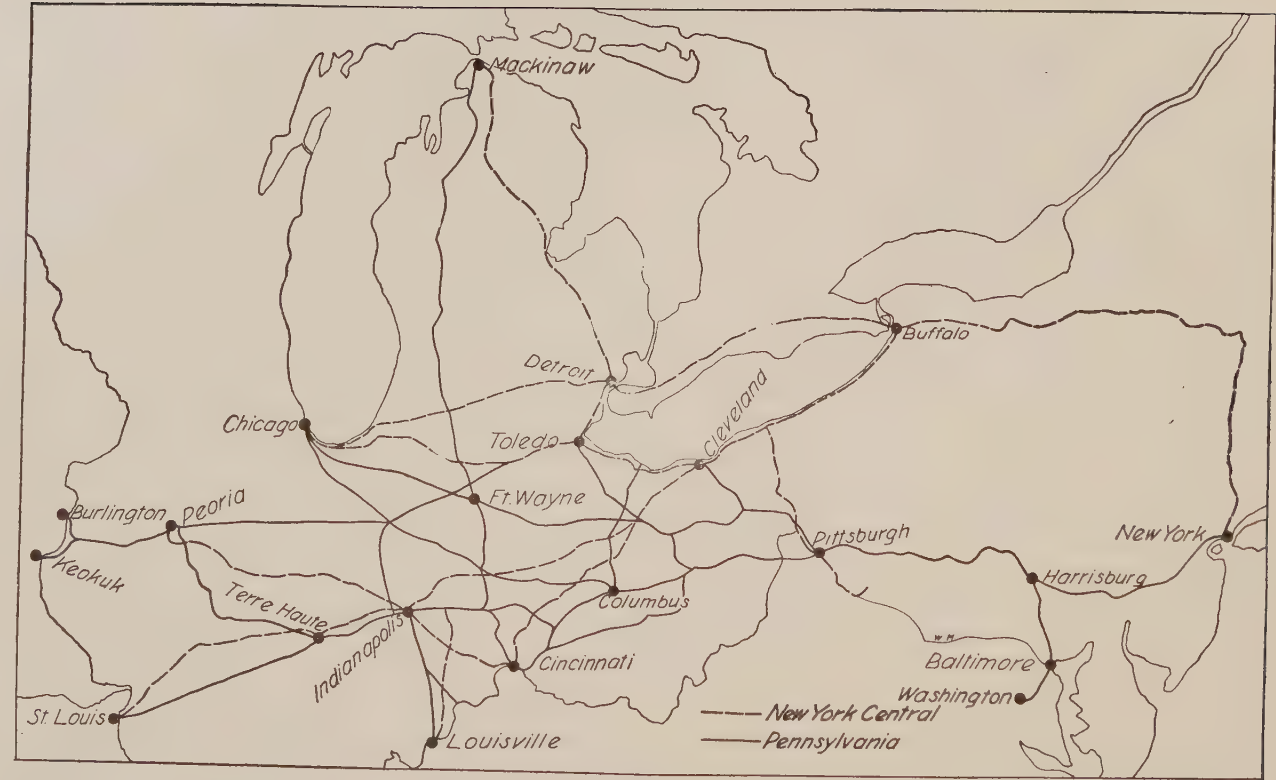

Mackinaw
Buffalo
Detroit
Cleveland
Chicago
Toledo
Ft. Wayne
Burlington
Peoria
Pittsburgh
New York
Keokuk
Harrisburg
Terre Haute
Columbus
Indianapolis
Cincinnati
Baltimore
Washington
W.M.
St. Louis
Louisville
New York Central
Pennsylvania

PLATE 22.

strategic basis. How well Commodore Vanderbilt and his successors matched the work of Scott and Thompson, who, by 1869, had entrenched the Pennsylvania at the strategic centers in Ohio, Indiana and Illinois, is indicated by a glance at the maps of these two dominating systems as they exist today. The Baltimore & Ohio has not been far behind; by absorbing the old Cincinnati & Marietta and the Ohio & Mississippi to St. Louis, by building to Chicago, connecting its Pittsburgh branch with this Chicago extension, and, in a later day, taking over the important lines of the bankrupt Cincinnati, Hamilton & Dayton, after a vain effort to carry the burden of that whole system, the B. & O. has reached most important competitive interchange points in the Middle West. Possession of the Monon and Cincinnati, Indianapolis & Western (the latter once a part of the C. H. & D. System), which the Commission proposes, would carry the B. & O. into Indianapolis and Louisville, and close to Peoria. The inclusion of the New Haven (for which a New England system is an alternative) in the Baltimore & Ohio would carry the system to Boston.[1] The present close alliance with the Reading would be perpetuated to give access to New York Harbor. Transfer of the eastern lines of the Wabash to the Erie stem would carry the Erie to the Mississippi at St. Louis and Keokuk to match the Pennsylvania. Adding the Lackawanna and the Delaware & Hudson would further entrench that carrier in the anthracite coal field. Its possession of the New York, Susquehanna & Western already gives it a place in that traffic.

The fifth system to be built up, primarily by the union of the Lehigh Valley and the Nickel Plate (New York, Chicago & St. Louis), has, as one of its essential elements, an anthracite carrier. The proposal to build up this system from carriers quite independent, reaching important centers but dependent upon connections for all through business, offers the only possibility really comparable to what private initiative developed in the years before 1900. Closely following upon the publication of the Commission's scheme, came announcement of successful negotiations by the Nickel Plate looking toward the absorption of

[1] Professor Ripley had proposed placing the Western Maryland with the Nickel Plate, giving that system the outlet at Baltimore rather than the New York Central. Consolidation Case, p. 490.

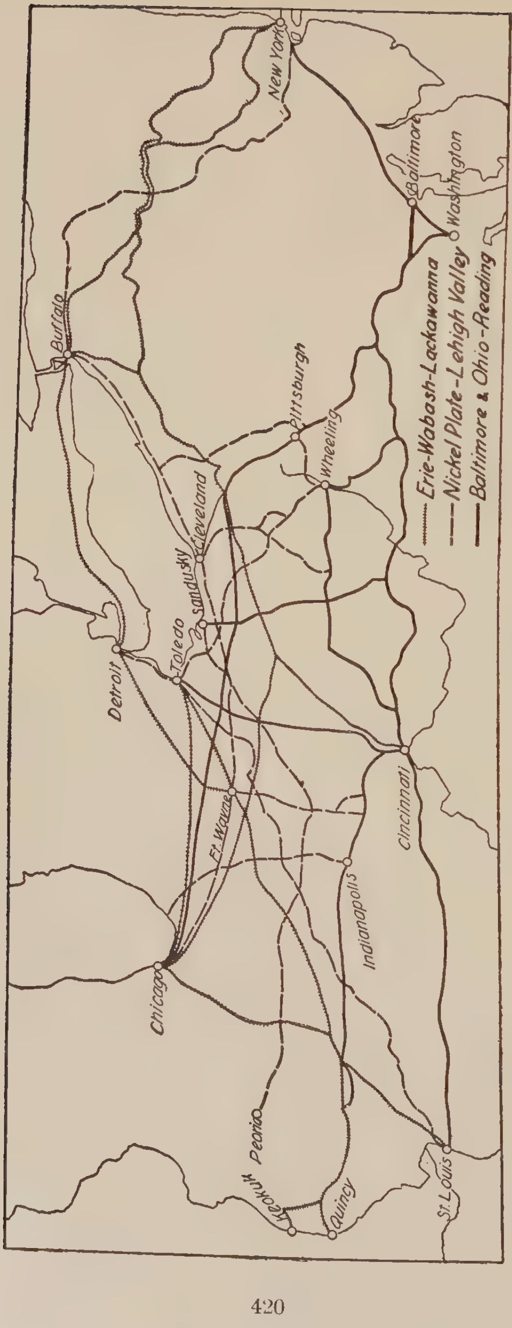

New York
Baltimore
Washington
Buffalo
Pittsburgh
Wheeling
Cleveland
Sandusky
Toledo
Detroit
Ft. Wayne
Cincinnati
Indianapolis
Chicago
Peoria
Keokuk
Quincy
St. Louis
Erie-Wabash-Lackawanna
Nickel Plate-Lehigh Valley
Baltimore & Ohio-Reading

Plate 23.

the Toledo, St. Louis & Western, giving it access to St. Louis, Toledo and Detroit, and the transfer of the Lake Erie & Western control from the New York Central, affording access to Indianapolis and Peoria.[1] Possession of the Wheeling & Lake Erie and Pittsburgh & West Virginia would carry the system to the Pittsburgh district, and provide soft coal and steel tonnage.

The extent to which the five proposed Trunk Line Systems would be competitive is illustrated by following chart. Since no change is proposed in the Pennsylvania System and since the New York Central System, by its possession of the Boston & Albany, already reaches Boston, the important new competitive situations must arise from the creation of the other systems.

	Penn.	*N.Y.C.-B.& M.*	*B.& O.-N.H.*	*Erie-D.L.& W.*	*N.P.-L.V.*
Boston		X	X		
New York	X	X	X	X	X
Philadelphia	X		X		
Baltimore	X	X	X		
Scranton			X	X	
Wilkes-Barre	X		X	X	X
Buffalo	X	X		X	X
Pittsburgh	X	X	X		X
Cleveland	X	X	X	X	X
Columbus	X	X	X		
Cincinnati	X	X	X	X	
Toledo	X	X	X	X	X
Detroit	X	X		X	X
Mackinaw	X	X			
Louisville	X	X	X		
Indianapolis	X	X	X		X
Peoria-Pekin	X	X			X
Springfield			X	X	
Keokuk	X			X	
Chicago	X	X	X	X	X
St. Louis	X	X	X	X	X

Through competition would also be furnished by the two Virginia trunk lines, which, by both rail and boat, have connection with the other Eastern port cities, and operate through routes. The Chesapeake & Ohio system reaches Chicago, Toledo, Louisville, Columbus, and Cincinnati; the Norfolk & Western, as proposed, Columbus, Toledo and Cincinnati. By attaching the Virginian to its western connection, the C. & O., a through route to the West, is secured for coal which now finds its market at tidewater, while the C. & O. secures modern Norfolk terminals,

[1] Control of Lake Erie & Western by Nickel Plate, 72 I. C. C. 459.

meeting on more equal terms the N. & W. which enjoys at Norfolk the terminal advantages of the first comer. The Norfolk & Western is similarly strengthened on the West by assigning the Toledo & Ohio Central lines for an entry into Toledo to meet the Hocking Valley, of the C. & O. But, for the N. &. W., no Chicago extension is provided to take the place of the Columbus to Chicago line of the Pennsylvania, which in the present day constitutes a family extension. It has not been thought necessary to carry the competition all the way: if the roads can be consolidated to meet at Norfolk, Cincinnati, Columbus and Toledo, it is thought that the substantial requirements of the new law will have been met. Especially is this true since the major portion of the traffic of both the Chesapeake & Ohio and Norfolk & Western is bituminous coal. The Pennsylvania, the Baltimore & Ohio, and the New York Central are already large carriers of all rail and lake-cargo coal. Inclusion of the Pittsburgh & Shawmut in the Erie System, of the Wheeling & Lake Erie and Pittsburgh & West Virginia in the Nickel Plate-Lehigh Valley, and of the Bessemer & Lake Erie in one or the other system, would insure a continuance of "market competition" in the movement of soft coal, already a most potent influence.[1]

The special treatment suggested for the Pere Marquette insures further competition on coal traffic. By attaching a line running across the trunk lines, the Detroit, Toledo & Ironton, the Commission proposes to give the Pere Marquette access to coal fields, and, at the same time, to place in its hands a club to insure fair treatment on interchange—the same club, it has been insisted, Mr. Ford wielded, the possession of a share of the high grade automobile traffic moving out of Michigan. In Michigan there would then be three railroads: the Grand Rapids & Indiana (Pennsylvania), Michigan Central (New York Central), and the Pere Marquette with which it is proposed to join the Ann Arbor and Detroit & Mackinac, and the D., T. & I. This would give three lines from Mackinaw City to the southern part of the peninsula, and, in effect, give the Baltimore & Ohio, the Nickel Plate, the Erie, and the Virginia lines access to a section rich in high grade traffic eastbound. If the New Haven

[1] Lake Cargo Coal Rates, 46 I. C. C. 159; see map above, p. 188.

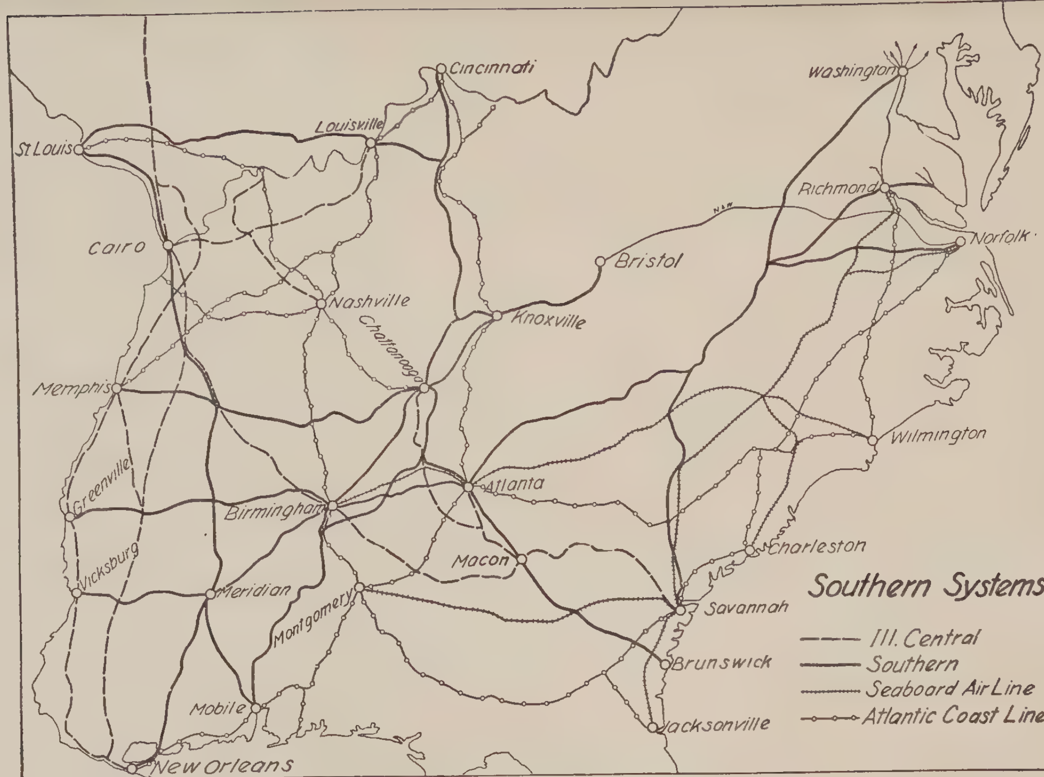

Southern Systems
Ill. Central
Southern
Seaboard Air Line
Atlantic Coast Line
Cincinnati
Washington
Louisville
St Louis
Richmond
Norfolk
Cairo
Bristol
Nashville
Knoxville
Chattanooga
Memphis
Wilmington
Atlanta
Greenville
Birmingham
Charleston
Macon
Vicksburg
Meridian
Montgomery
Savannah
Brunswick
Mobile
Jacksonville
New Orleans

Plate 24.

were again joined with the Boston & Maine there would be left as competitors in New England only the Boston & Albany, and the Central Vermont—Grand Trunk system. Uniting the New England lines with the Delaware & Hudson and the Lackawanna, to reach the anthracite fields direct, and to carry traffic through to Buffalo, where the Buffalo, Rochester & Pittsburgh would deliver a soft coal tonnage would create a "New England—Great Lakes" system, is a second alternative. The third, placing the New Haven with the B. & O., and the Boston & Maine with the New York Central, would create a more real competitive situation, on through business. On local business, there has long since been effective monopoly of the field. Indeed, consolidation has gone so far in New England that it is difficult to establish any systems truly competitive and conforming to the flows of traffic without dismemberment of systems already well knit together in personnel and working tradition. New England, because of the terminal character of its lines, is the most logical place for the exercise of the Commission's discretion in permitting substantial monopoly in the public interest.

§ 7. In the South the problem is rather one of finding a place for the numerous small independent lines, than of providing through competition on long hauls. Already combination has created two systems operating lines from St. Louis and the Ohio River to the Gulf and from the Virginia Cities (Norfolk and Richmond) to the South Atlantic ports and Atlanta; the Southern Railway, with its proud boast that "the Southern serves the South," and the Atlantic Coast Line—Louisville & Nashville system. Control of the Central of Georgia, owning the Ocean Steamship Company, gives the Illinois Central a voice in the joint councils. Now it is proposed to allocate the latest of the systems paralleling the Eastern coast, the Seaboard Air Line, to the Illinois Central, to complete a third line through Birmingham and Atlanta, around the base of the mountains, although officials of both roads have appeared before the Commission in protest. These three systems, with the assigned short lines, would effectively complete the occupation of the South—three "horse shoe," or "U" systems.

The extent of the competition is effectively shown by the following chart:

	Southern	A.C.L.-L.& N.	I.C.-S.A.L.
1. Ohio River Crossings:			
Cairo	X		X
Evansville	X	X	X
Louisville	X	X	X
Cincinnati	X	X	
2. Virginia Cities and Washington:			
Norfolk	X	X	X
Richmond	X	X	X
Washington	X	X	
3. Mississippi River Crossings:			
St. Louis	X	X	X
Memphis	X	X	X
Vicksburg	X		X
New Orleans	X	X	X
4. Interior Points:			
Nashville		X	X
Chattanooga	X	X	
Charleston	X	X	X
Birmingham	X	X	X
Atlanta	X	X	X
5. South Atlantic Ports:			
Jacksonville	X	X	X
Brunswick	X	X	X
Savannah	X	X	X
Charleston	X	X	X
Wilmington		X	X
6. Gulf Ports:			
New Orleans	X	X	X
Mobile	X	X	
Pensacola		X	

§ 8. Lines in the Southwest now radiate from St. Louis. The channels of trade are generally northeast and southwest, an exchange of grain, lumber and cotton for manufactures. The proposal of the Commission comprehends two great southwestern systems with a Chicago entrance, however, in order to meet the effective competition from the two proposed Southwestern transcontinentals, the Santa Fé and the Southern Pacific-Rock Island which would have Chicago terminals and a net of southwestern branch lines. By combining the St. Louis-San Francisco, the Missouri, Kansas & Texas and the St. Louis Southwestern with the Alton, and joining the Missouri Pacific with the Chicago & Eastern Illinois, two systems are proposed extending from Chicago to St. Louis and Kansas City, and, by lines to the South, occupying effectively the states of Arkansas, Louisiana, Oklahoma and Texas. With the "Frisco-Katy-Cotton Belt" would be included the Louisiana Railway & Navigation Com-

pany, to give entrance to New Orleans, and with the C. & E. I.-Missouri Pacific would be included the Kansas City Southern the Kansas City, Mexico & Orient, the Texas & Pacific, the International & Great Northern and the Gulf Coast Lines, connections with New Orleans, Port Arthur, and Galveston.

Again the chart is helpful to illustrate the extent of the competition:

	"F.-K.-C.B."	*C.& E.I.-M.P.*	*Santa Fé*	*S.P.-R.I.*
Chicago	x	x	x	x
Peoria-Pekin	x		x	x
St. Louis	x	x		x
Kansas City	x	x	x	x
Memphis	x	x		x
Shreveport	x	x		x
New Orleans	x	x		x
Little Rock	x	x		x
Muskogee	x	x		x
Oklahoma City	x	x	x	x
Wichita	x	x	x	x
Ft. Worth	x	x	x	x
Dallas	x	x	x	x
Amarillo			x	x
El Paso		x	x	x
San Antonio	x	x		x
Houston	x	x	x	x
Galveston	x	x	x	x

The remarkable disclosure of this chart is the extent to which the proposed Southern Pacific-Rock Island merger would dominate this competitive situation. These two systems are striking complements in their strategic ramifications.

§ 9. To supply the need for east and west transportation west of Chicago and the Mississippi (New Orleans, St. Louis to the Twin Cities) the aim of the Commission plan has been to build up five systems which would be competitive in pairs:

a. *Southern Pacific-Rock Island*, competitive with the Santa Fé in conjunction with the Chicago-Missouri Pacific (present Texas & Pacific and Gulf Coast lines).

b. *Santa-Fé-Colorado & Southern-Western Pacific*, competitive with above, and more directly with the Union Pacific-Chicago & North-Western.

c. *Union Pacific-Chicago & North Western*, competitive with above, and more directly with the Northern Pacific-Burlington.

d. *Northern Pacific-Burlington*, competitive with above, and more directly with the Great Northern-St. Paul.

e. *Great Northern-St. Paul*, competitive with above, and with the Canadian Lines.

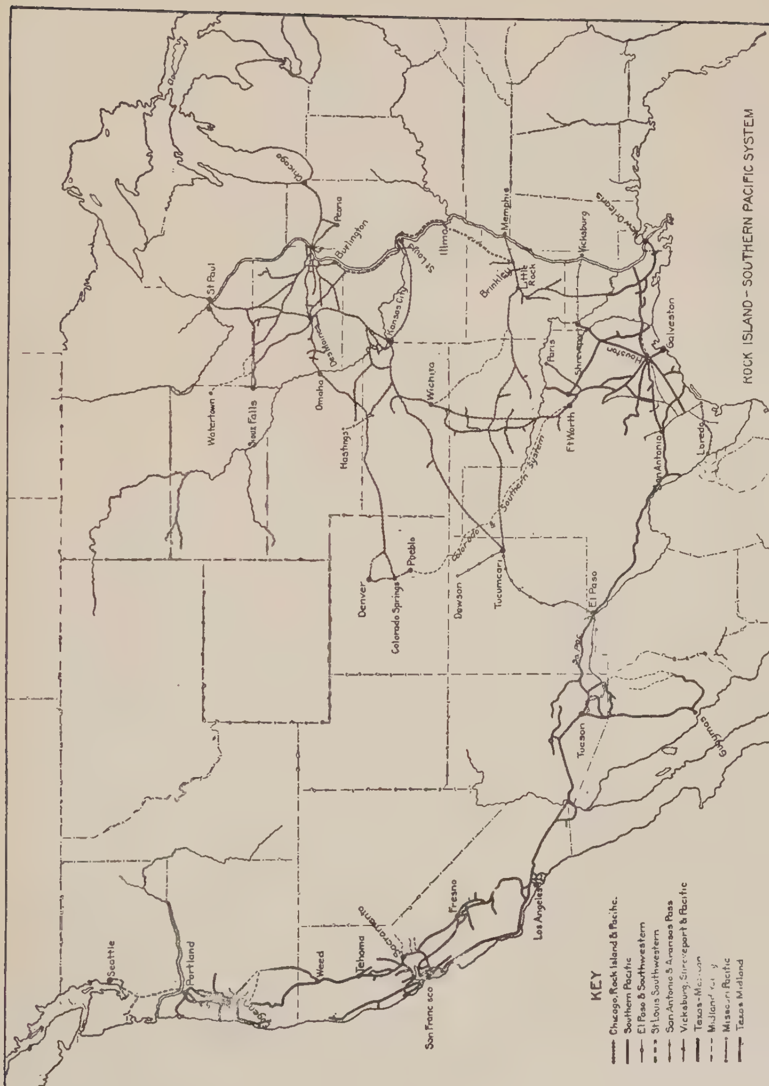

ROCK ISLAND - SOUTHERN PACIFIC SYSTEM
KEY
Chicago, Rock Island & Pacific
Southern Pacific
El Paso & Southwestern
St Louis Southwestern
San Antonio & Aransas Pass
Vicksburg, Shreveport & Pacific
Midland Valley
Missouri Pacific
Texas Midland
Seattle
Portland
Weed
Tehama
Sacramento
San Francisco
Fresno
Los Angeles
Tucson
El Paso
Denver
Colorado Springs
Pueblo
Dawson
Tucumcari
Hastings
Omaha
Des Moines
Kansas City
Wichita
St Paul
Watertown
Sioux Falls
Chicago
Peoria
Burlington
St Louis
Illmo
Memphis
Brinkley
Little Rock
Vicksburg
New Orleans
Shreveport
Paris
Ft Worth
Houston
Galveston
San Antonio
Loredo
Colorado & Southern System

PLATE 25.

On export and import business, the lines would all be competitive on tonnage moving via the Pacific Ports through either the Chicago, St. Louis or Kansas City gateways.

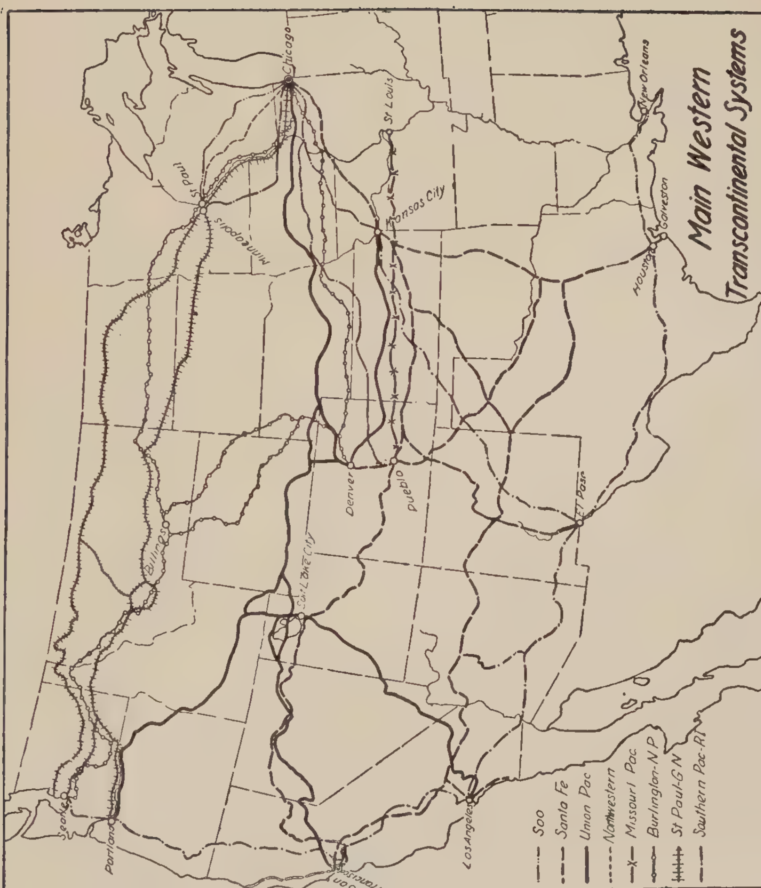
The chart this time indicates a wider dispersion, conforming with the spreading of the fan from Chicago:

	S.P.-R.I.	*C.& E.I.-M.P.*	*"F.K.-C.B."*	*S.F.-W.P.*	*U.P.-C.& N.W.*	*N.P.-B.*	*G.N.-St.P.*
Chicago	X	X	X	X	X	X	X
Twin Cities	X				X	X	X
Duluth					X	X	X
St. Louis	X	X	X		X	X	X
New Orleans	X	X	X				
Houston	X	X	X	X			
Galveston	X	X	X	X			
Ft. Worth-Dallas	X	X	X	X			
Omaha	X	X			X	X	X
Kansas City	X	X	X	X	X	X	X
Rapid City					X	X	
Denver-Pueblo	X	X		X	X		X
El Paso	X	X	X				
Salt Lake City	X		X	X			
Butte					X	X	X
Spokane					X	X	X
Reno	X			X			
Phoenix	X			X			
Los Angeles	X			X	X		
San Francisco	X			X			
Portland	X				X	X	X
Seattle					X	X	X

At Chicago all the truly transcontinental systems are represented: at St. Louis, four; at the Twin Cities, four; at New Orleans, one; on the West Coast at Los Angeles, three; at San Francisco, two; at Portland, four; at Seattle, three. The Southwestern systems in connection with the Santa Fé would give New Orleans three lines. The character of the transportation service is such that the competition must be primarily on long through hauls.

Thus far, the Commission plan has been discussed as a picture: hardly otherwise than as a series of railroad maps. After all, that is about all it is. Analysis has shown that in building up these maps, the Commission gave attention to the requirement of the law that it preserve traffic flows and competition,[1]

[1] Much the same service had previously been performed by a Boston banker, Mr. John E. Oldham, whose article in the *Nation's Business*, for February, 1920, as subsequently expanded, "A Plan for Railroad Consolidation," was published with maps and tables by the Investment Bankers'



Main Western Transcontinental Systems
Chicago
St Louis
Kansas City
St Paul
Minneapolis
New Orleans
Galveston
Houston
Denver
Pueblo
El Paso
Salt Lake City
Billings
Seattle
Portland
San Francisco
Los Angeles
Soo
Santa Fe
Union Pac
Northwestern
Missouri Pac
Burlington-N P
St Paul-G N
Southern Pac-R I

PLATE 26.

although in the hearings held subsequent to the issuance of the tentative plan it early developed that this requirement is open to a variety of interpretations.

But the problem of consolidation cannot be considered from these viewpoints alone. It must be considered as part of the larger scheme for credit rehabilitation: especially as a scheme for "taking care" of the "weak" roads. It is, therefore, important to examine the proposed systems to learn the disposition of those roads of generally poor credit standing. The proposal is clearly that the strong shall support the weak: in the East, the Lackawanna, the Delaware & Hudson, and the Bessemer & Lake Erie must share with the Erie and the Wabash; the Lehigh Valley and the Nickel Plate with the Toledo, St. Louis & Western, the Wheeling & Lake Erie and the Pittsburgh & West Virginia. No "weak" properties are attached to the Pennsylvania, New York Central, or the Baltimore & Ohio, unless the Boston & Maine, and New Haven should be added to the New York Central and B. & O. respectively. In the South the important allocation is that of the Seaboard with the Illinois Central, which, however, has added to it, also, the Gulf & Ship Island and Tennessee Central, neither of them conspicuously successful properties. To the Atlantic Coast Line-Louisville & Nashville are added the Norfolk Southern, the Atlanta, Birmingham & Atlantic, the Georgia & Florida, the Gulf, Mobile & Northern and the Mississippi

Association. In many particulars, his independent conclusions are strikingly like those of the Commission, but in details there is considerable variation, due to his placing direct competitors in the same system. Thus he places the Western Maryland with the B. & O.; the Seaboard with the Southern; the Norfolk & Western with the Chesapeake & Ohio. He builds up four Trunk Lines, instead of five, by including most of the lines of the Commission's Erie and Nickel Plate systems in a single "Buffalo" system, in which also he included the Pere Marquette. The southwestern lines grouped by the Commission with the Missouri Pacific he included with the Santa Fé. Those included in the "Frisco-Katy-Cotton Belt" were divided respectively between the Great Northern–St. Paul System, the Northern Pacific–Burlington (to which was also assigned the Denver & Rio Grande Western), and the Southern Pacific–Rock Island. Thus his transcontinentals were all connected with the Gulf. The New England roads he would bring together. The New England problem is also discussed in Mr. Oldham's *The Place of the New England Railroads in the Plan for Railroad Consolidations*, published by the Investment Bankers' Association, May, 1922.

Looked at from the point of view of mileage and earnings per mile operated, Mr. Oldham's fourteen systems are more nicely balanced than the Commission's nineteen. The Commission's scheme presents systems more compact, and more truly competitive.

Central, all in all, not a particularly promising outfit. No additions are made to the Southern system. Allocating the Wabash to the Union Pacific removes one element of weakness in Western territory; allocating the Chicago Great Western and the Minneapolis & St. Louis to the Northern Pacific-Burlington removes two more; joining the St. Paul to the Great Northern and the Rock Island to the Southern Pacific means union of uneven strength, perhaps, but not a union of strength with conspicuous weakness. Unless there should be very drastic scaling down of fixed charges in the "Frisco-Katy-Cotton Belt" and the C. & E. I.-Missouri Pacific systems, however, it is difficult to see many elements of convincing strength. The same is true to an extent in Michigan and conspicuously true in New England. The recent reorganizations of the Frisco, the Katy, the Chicago & Eastern Illinois, the Gulf Coast Lines, the Pere Marquette and the Boston & Maine have not yet met the test of time. Something more than mere consolidation may still be needed.

This conclusion is the clearer when it is remembered that even the requirement of the law that the value of the consolidated properties and the capitalization at par must be equal need not, of itself, force financial readjustments for the roads whose weakness arises almost solely from an unduly high ratio of fixed charges to total earnings. Not a few roads, once weak, have strengthened their position by rigorous reorganization after a receivership. Voluntary reorganizations usually proved mere halfway measures. But the troubles of the Northern Pacific and even of the Santa Fé and the Union Pacific in the middle 90's taught a lesson learned once for all; their difficulties were due to an overload of fixed charges arising from branches and system lines, which could not be made to pay their way immediately. More recently, the Rock Island, keeping together the system built up in the Moore-Reid régime—a tribute to the appreciation by the latter of the fundamental strategic problem—has rebuilt upon a new foundation. And the Frisco, a factor in the failure of the Santa Fé in 1893 and of the Rock Island in 1915, has come out of a receivership relieved of unprofitable guarantees of dividends and interest. These experiences clearly point the way. Until the weak roads readjust their finances, or their security holders evidence a willingness to do so, few strong roads will feel

inclined to assume a responsibility akin to blood transfusion. A net gain, or at least a strong probability that any excess earnings which the law proposes shall be equally shared with the government will be recouped, will be necessary to provide a selfish motive for action by the strong roads. There is no point for the shareholder, already well satisfied, to agree to a process of averaging conditions, when for him the averaging can only work downwards. Human nature and the business world do not work that way. The hesitation will be greater because the weak roads have little to offer that the strong roads do not already possess. The weak road is dependent on the strong for through connections. Consolidation might well mean that the strong road paid for something it now gets for nothing. Protection from rate wars is assured; there is even provision in the present law to permit pooling—provided the Commission finds that the division of traffic or earnings does not unduly restrain competition.

§ 10. The sole compensation for consolidation might prove to be possible economies in administration and operation. These are at best uncertain. The duties most susceptible of consolidation are those of general supervision, the cost of which is but a relatively small part of the total. It would be necessary to run trains to accommodate local traffic, and the competitive duplication of service between prominent terminals, where it is most expensive, would not be affected. Traffic solicitation would not cease. And it would still be necessary to maintain track and equipment, presumably at a standard at least equal to the pre-consolidation standard. Consolidation would, after all, create quite as many problems of management as it would solve. Concerning these, except as they may be related to the task of credit rehabilitation, the Act and the paper scheme of the Commission are silent. Yet surely any scheme of consolidation must take into account the necessary expansion of efficient and harmonious groups of supervisory departments, and the creation of a new loyalty in the rank and file. The experience with the New Haven "axe" committee on the Boston & Maine is here significant.[1] Any scheme of consolidation built up by comparing figures and looking at maps is very apt to overlook these human elements so essential in a business dominated by attention to routine details.

[1] New England Investigation, 27 I. C. C. 560, 596.

The obstacles are not unsurmountable, but they are very real, and it would be absurd to ignore them.

Of course the whole series of problems expressed in these terms can be compressed into a single statement. The great task is to get leaders. The Commission's scheme proposes systems larger than any known heretofore except the great amalgamation dominated by the genius of Mr. Harriman.[1] But Harrimans are rare. Always large scale operations call for management of a high order, lest they fall with their own weight. Because of the nature of the railroad business (its function being to overcome distance), the size and extent of the system become of first importance. The peculiarity which distinguishes the railroad organization problem is the inability to place the working force under a single roof. Only in shops and offices is this possible. The great work of moving freight and passenger trains must be done on the road, where individual initiative and loyalty count. The "line" organization has been taken over from the military tradition because it fits the needs of the railroad business. But the discipline which it imposes is only effective when there is *esprit-de-corps*. The importance of local autonomy and the placing of direct responsibility was recognized by Mr. Harriman. He concerned himself rather with the scheme of grand strategy than with operating problems. Standards were imposed by his general staff. To meet the need of close supervision, the Pennsylvania has its operating regions; and other systems, built up by stock ownership alliances, even when the control is substantially complete, preserve the identity of constituent companies. Experience during Federal control, while seldom conclusive, did point a moral here: it was necessary to subdivide the original operating regions and to create new Regional Directors.

§ 11. And if the scheme for voluntary consolidation fails, what then? Can there be enforced a scheme of compulsory con-

[1] Before the dissolution, the Union Pacific–Southern Pacific system together operated 18,500 miles. The Illinois Central–Central of Georgia, under the same financial management, operated some 6,500 miles more; the affiliated Salt Lake Route operated 1,200 miles; the Alton, 1,000 miles. Professor Ripley's proposed systems show four systems of approximately 20,000 miles, 7 of 10 to 15,000 miles, 3 of 7,500 to 10,000 miles, 1 of 5,000 to 7,500 miles, and 5 of 2,500 to 5,000 miles. The Commission's systems would be of the same general size. For Professor Ripley's statistical summary, see Consolidation of Railroads, p. 640.

solidations? Can property be taken from him who has, for sharing with him who has not, solely because it is in the public interest? A great question of constitutional law is opened up which need not and cannot here be decided. It is a question for the future. But the great underlying issue of public responsibility rather than of public right can be exposed. If the needs of the public call for consolidations which cannot voluntarily be effected under a system of private ownership, the responsibility of the public to the private owners can be met in one of two ways: by a guarantee of earnings, or by public ownership. It is idle to talk glibly about the rights of the public unless the public is willing to assume financial responsibility. But all this concerns a turn of affairs which is now in the realm of conjecture, and must there remain until the passage of time has demonstrated whether the scheme of voluntary consolidation can be made operative. To the future, therefore, must it be left.

APPENDICES

APPENDIX I

DEVELOPMENT OF FEDERAL REGULATION

The evolution of the regulation of interstate commerce since 1887 and of the duties and powers of the Interstate Commerce Commission is briefly portrayed in the following statement, which indicates the important changes in the Interstate Commerce Act from its passage in 1887 to and including the passage of the Transportation Act, February 28, 1920:

1887. Original act, approved February 4, 1887, applied to "any common carrier or carriers engaged in the transportation of passengers or property wholly by railroad, or partly by railroad and partly by water when both are used, under a common control, management or arrangement, for a continuous carriage or shipment. . . .

Rebating made a crime, punishable as such. Personal discrimination of every sort forbidden.

Local discriminations forbidden.

Long-and-short-haul clause included.

All pooling and traffic agreements prohibited.

Interstate Commerce Commission of five members established having "authority to inquire into the management of the business of all common carriers subject to the provisions of this act, and shall keep itself informed as to the manner and method in which the same is conducted. . . ."

The original act did not confer rate-making power, but this omission does not seem to have been discovered until the Supreme Court decided the Social Circle Case in 1896 (162 U. S. 184), almost 10 years after the act was passed.

The Supreme Court found no provision of the act "that expressly or by necessary implication conferred such powers." Subsequent decisions in other courts followed the Supreme Court's reasoning.

1903. *Elkins law.*—Approved February 19, 1903. Criminal provisions against rebating and failures to collect fixed charges *with penalties.* In the original act these practices were simply "prohibited and declared to be unlawful." The Elkins amendments dealt with provisions of law regarding observance of published tariffs, but had no effect on determination of what the tariffs should be. Abolished imprisonment as penalty but provided fines.

Expediting act of 1903. Under Elkins law this act "shall apply in

any case prosecuted under the direction of the Attorney General in the name of the Interstate Commerce Commission."

1906. *Hepburn law.*—Approved June 29, 1906. Increased Interstate Commerce Commission to seven members. Broadened field of Federal regulation to cover express and sleeping car companies and pipe lines. Authorized commission to "determine and prescribe," upon complaint, just and reasonable *maximum* rates.

Reimposed penalty of imprisonment, as well as fine, for departure from published tariffs.

Commodities clause included:

Standardized carriers' reports to Commission, and monthly and special reports as well as annual might be required under oath, with penalties of fine and imprisonment for delay and misstatement.

Carmack amendment.—Initial carrier to issue bill of lading and be liable for damage on connecting line.

1910. *Mann-Elkins law.*—Approved June 18, 1910. Jurisdiction of Commissions extended over "interstate telegraph, telephone, and cable companies, wire or wireless." Granted power to suspend changes in rates for examination as to their reasonableness, and placed burden of proof as to their reasonableness on the carriers.

Resuscitated long-and-short-haul clause—section 4—by eliminating the phrase "under substantially similar circumstances and conditions" and prohibiting increases in rates due to elimination of water competition.

Created Commerce Court.

Railroad required to quote rates on written request, being liable to penalty of $250 for misstatement from which loss to shipper should result.

Shipper given power to route shipments.

Commission given power to institute inquiries on own initiative.

1912. *Panama Canal act.*—Approved August 24, 1912. Commission given jurisdiction over property that may be or is transported from point to point within the United States by rail and water through the Panama Canal or otherwise.

Commission given power to order rail lines to make physical connections with water carriers.

Commission given power to establish through routes and maximum joint rates "between and over such rail water lines . . . ," also proportional rates to and from ports.

Railroads prohibited from operating vessels through the Panama Canal in competition with boat lines.

1913. *Valuation act.*—Approved March 1, 1913, provided for investigation, ascertainment, and report of the value of carriers' properties.

Commerce Court *abolished* by the district court jurisdiction act provisions from the urgent deficiency appropriations act of October 22, 1913.

1915. Cummins amendment as to liabilities, approved March 4, 1915.

1916. Cummins amendment as to liabilities and released rates, approved August 9, 1916.

Federal possession and control act.—Provisions from Army appropriation act, approved August 29, 1916. War-time operation.

1917. *Car service act.*—Approved May 29, 1917. Power to suspend and prescribe car-service rules.

Priority of shipment act.—Approved August 10, 1917. Preferential transport of certain selected shipments.

Organization amendment to section 24 of I. C. C. act, approved August 9, 1917. Increased number of commissioners, and authorized action by divisions.

Increased rates until January 1, 1920, to be approved by I. C. C. (15th section applications).

1918. *Federal control act.*—Approved March 21, 1918. Provisions for operation while under Federal control. Compensation based on average return three years ended June 30, 1917.

Revolving fund of $500,000,000 appropriated.

Section 10. President to initiate rates. I. C. C. to pass upon.

1920. *Transportation act.*

Terminating Federal control.

Settlement of disputes between carriers and employees.

Amending act to regulate commerce—changes to Interstate Commerce Act.

Sec. 209. Guaranty to carriers after Federal control.

Sec. 210. New loans to railroads upon Interstate Commerce Commission certificate.

Amendment to act—Revision of text.

Sec. 1. Changes in territorial descriptions. Sec. 1, sub. c, eliminates water carriers which absorb terminal charges; limits jurisdiction over "rail-water" to "common control." Car service (Tank car case 242 U. S. 208). Executive action when emergency exists. Certificates of convenience and necessity (I. C. C.). Extensions, abandonments.

Sec. 3. *Charges* must be paid before surrender of shipment after July 1, 1920, Ex Parte 73, Op. 6204, 57 I. C. C. 591. (3) Eliminates provision about not requiring carrier to give use of terminals to another road. (4) Joint use of terminals.

Sec. 4. Lower charge must be compensatory. Circuitous route provision. No relief for potential water competition.

Sec. 5. Interstate Commerce Commission may permit pooling of freight and division of earnings. Acquisition of control. Consolidation of lines.

Sec. 13. (3) Conference and coöperation with the State commissions respecting relationship of inter and intra state rates. (4) Interstate Commerce Commission prescribe maximum rate, charge, classifi-

cation, regulation, minimum, or both, and remove undue preference "between inter and intra state traffic."

Sec. 15. Power to prescribe maximum, minimum, or both, for traffic subject to act. Street electric passenger railways excepted. Establishment of temporary through routes. (5) No loading and unloading charges for live stock at public yards. (7) Suspension limited to 120 days plus 30 days. (10) Interstate Commerce Commission may direct routing when unrouted by shipper.

Sec. 15a. Carriers, under rate-making provisions of this section, shall not include (*a*) sleeping-car companies, express companies; (*b*) street or suburban electrics; (*c*) interurban electric; (*d*) belt line owned by a State. (2) Interstate Commerce Commission shall initiate rates so that carriers as a whole will earn fair return. (3) Interstate Commerce Commission shall determine percentage of fair return 5½ per cent two years beginning March 1, 1920, plus one-half per cent for betterments and improvements. (4) Determination of value by Interstate Commerce Commission. (5) Income in excess of fair return held as trustee for United States. (6) Disposition thereof in excess of 6 per cent, one-half to reserve fund, one-half to railroad contingent fund. (7) Carrier may draw from reserve fund for dividends, etc. (10) Uses of contingent-fund loans to carriers. (15) Interstate Commerce Commission may acquire and dispose of equipment.

Sec. 20a. Regulation by Interstate Commerce Commission of issuance of securities.

Sec. 24. Commission enlarged to 11 members.

Sec. 25. United States registry steam vessels to file schedules with Interstate Commerce Commission of (1) ports, (2) dates of arrival, (3) routes. (2) Rail and water carriers must quote rates on shipper's request; reservations of space by water carrier for railroad. (3) Interstate Commerce Commission prescribe regulations for publishing water schedule. (4) Issuance of through bill of lading when space reserved. (5) Not "continuous carriage."

Sec. 26. Interstate Commerce Commission may require installation of safety devices.

Report of Joint Commission of Agricultural Inquiry; Transportation, p. 394.

APPENDIX II

SUGGESTED READINGS

The Superintendent of Documents, Washington, sells "The Interstate Commerce Act" in book form, including also the text of other Federal Acts governing railroad affairs. This material, together with the Commission's tariff circular, containing the regulations on tariff publication, the Conference Rulings, the Rules of Practice, and brief explanations of the rate bases has annually been gathered into the Freight Traffic Red Book.

The Commission's Annual Reports carry statistical summaries, and digests of important court decisions, in addition to the record of the Commission's own activities.

Professor Felix Frankfurter has edited and The Harvard University Press publishes *Cases under the Interstate Commerce Act.* This collection contains the outstanding Supreme Court opinions on Federal regulation, and illustrative Interstate Commerce Commission opinions. Many of these are cited in the text of this volume or in the lists below and the case book will prove a convenient source of illuminating material for student and teacher, and also even for the general reader, especially for those not having ready access to a complete file of Court and Commission opinions. By restating the essential facts in brief compass, Professor Frankfurter has performed a further service in economizing the time of busy men. Experience in law schools has long since demonstrated the effectiveness of the case method of instruction and the Graduate School of Business Administration of Harvard University has adapted the case system to the study of business. In no field of business activity is so large a supply of live cases readily available as in the field of railroads; these now touch problems of rates, service and management. The study of such cases provides stimulating material from which to develop classroom discussion. Professor Frankfurter's case book has been the basis of the course in Transportation given in the Northwestern University School of Commerce, 1915-1922. Professor W. Z. Ripley's collection of papers and cases, *Railway Problems* (Ginn & Co.) is less specialized in nature.

The following volumes present theoretical or historical material:

Harry G. Brown, *Transportation Rates and their Regulation,* Macmillan, 1916.

Arthur S. Dewing, *Financial Policy of Corporations,* Ronald, 1920.

Frank H. Dixon, *Railroads and Government,* Scribners, 1922.

Arthur T. Hadley, *Railroad Transportation,* Putnam, 1885, out of print.

Emory R. Johnson and T. W. Van Metre, *Principles of Railroad Transportation,* Appleton, 1921.

William Z. Ripley, *Railroads, Finance and Organization,* Longmans, 1915.
Railroads, Rates and Regulation, Longmans, 1912.

I. Leo Sharfman, *The American Railroad Problem,* Century, 1921.

They will be indicated, in the following list of suggested readings, by reference to the name of the author.

PART I

THE SCOPE AND MACHINERY OF REGULATION

Chapter I. The Subject Matter of Regulation.

Charles F. Adams, *Railroads, their Origin and Problems,* pp. 81-230.
Solon J. Buck, *The Granger Movement.*
Frank H. Dixon, *State Railroad Control.*
Hadley, pp. 125-145.
Sharfman, p. 1-26.

Chapter II. The Agencies of Regulation.

Dixon, pp. 258-268 (*Railroads and Government*).
Johnson and Van Metre, pp. 467-491.
Ripley, *Rates,* pp. 627-638.

Chapter III. Practice Before Commissions.

Henry S. Drinker, *The Interstate Commerce Act,* pp. 407-443.
Frederick N. Judson, *Interstate Commerce,* Third Ed., pp. 562-615.
Edgar Watkins, *Shippers and Carriers,* Third Ed., pp. 569-624.

Chapter IV. The Commissions and the Courts.

H. B. Fuller, *Interstate Commerce,* pp. 5-57.
Dixon, pp. 43-51.
Johnson and Van Metre, pp. 535-563.
Ripley, *Rates,* pp. 456-485; 494-508; 538-557.

Problems: H. S. Smalley, *The Doctrine of Judicial Review,* pp. 619-641; F. J. Swayze, *Regulation of Railway Rates under the Fourteenth Amendment,* pp. 716-744; and *Maximum Freight Rate Decision of 1897,* pp. 187-197; *The Commerce Court Decision of 1911,* pp. 198-215.

CASES ON THE CARRIERS AND COMMERCE SUBJECT TO THE INTERSTATE COMMERCE ACT

A. Carriers.
- (a) The Pipe Line Cases, 234 U. S. 548.
- (b) Chicago Junction Ry. Co. *v.* U. S., 226 U. S. 286.
- (c) Omaha Street Railway Co. *v.* I. C. C., 230 U. S. 324.
- (d) Unrepeated Message Case, 44 I. C. C. 670.
- (e) In re Express Companies, 24 I. C. C. 380.
- (f) N. C. & St. L. Ry. Boats and Barges, 49 I. C. C. 737.
- (g) Loftus *v.* Pullman Co., 20 I. C. C. 21.

B. Commerce.
- (a) *State or Interstate.*
  1. Coe *v.* Errol, 116 U. S. 517.
  2. C. M. & St. P. Ry. Co. *v.* Iowa, 233 U. S. 334.
  3. G. C. & S. F. Ry. Co. *v.* Texas, 204 U. S. 403.
  4. Ohio R. R. Com. *v.* Worthington, 225 U. S. 101.
  5. Hanley *v.* K. C. Southern Ry. Co., 187 U. S. 617.
  6. West Virginia Rail Co. *v.* B. & O. R. R. Co., 26 I. C. C. 622.
- (b) *State or Foreign.*
  1. R. R. Com. of La. *v.* T. & P. Ry. Co., 229 U. S. 336.
  2. Texas & New Orleans R. R. Co. *v.* Sabine Tram Co., 227 U. S. 111.
  3. Southern Pacific Terminal Co. *v.* I. C. C., 219 U. S. 498.
- (c) *State Jurisdiction.*
  1. Rhodes *v.* Iowa, 170 U. S. 412.
  2. Heyman *v.* Southern Railway, 203 U. S. 270.

PART II

RATES

CHAPTER V. THE RATE MAKING POWER.
- DIXON, pp. 7-27; 247-257.
- RIPLEY, *Rates,* pp. 467-472; 500-501; 560-562; 594-600.

CHAPTER VI. THE PUBLISHED RATE.
- BROWN, pp. 175-192.
- HADLEY, pp. 119-124.
- RIPLEY, *Rates,* pp. 185-214.

CHAPTER VII. ECONOMICS OF RATE MAKING.
- W. M. ACWORTH, *Elements of Railway Economics* (Oxford).
- BROWN, pp. 3-70.
- HADLEY, pp. 82-124.
- JOHNSON AND VAN METRE, pp. 337-351.
- RIPLEY, *Rates,* pp. 44-100.

CHAPTER VIII. GENERAL RATE LEVELS.
- DIXON, pp. 158-167; 227-257.
- SHARFMAN, pp. 255-309; 415-426.

CHAPTER IX. THE EQUALIZATION PRINCIPLE.

BROWN, pp. 37-70.

RIPLEY, *Rates*, pp. 246-252.

Problems: ROBERT MATHER, *How the States Make Interstate Rates*, pp. 530-552; *Export and Domestic Rates*, pp. 487-521.

United States Tariff Commission, *Preferential Transportation Rates.*

CHAPTER X. THE DISTANCE PRINCIPLE.

C. COLSON, *Railway Rates and Traffic*, pp. 53-111.

RIPLEY, *Rates*, pp. 101-110.

CHAPTER XI. THE LONG AND SHORT HAUL PRINCIPLE.

W. M. ACWORTH, *Elements of Railway Economics*, pp. 75-88.

BROWN, pp. 226-275.

DIXON, pp. 28-42; 253-254.

HADLEY, pp. 114-119.

RIPLEY, *Rates*, pp. 215-263; 601-626.

Problems: pp. 297-314; 357-486.

CHAPTER XII. GROUP RATE PRINCIPLES.

RIPLEY, *Rates*, pp. 356-410.

CASES ON RATE MAKING

A. Freight Classification.
   Western Classification Case, 25 I. C. C. 442.
   Western Trunk Line Rules, 34 I. C. C. 554.
   Consolidated Classification Case, 54 I. C. C. 1.

B. Rate Structures.
   1. *New England Adjustment.*
      (a) Proposed Increases in New England, 49 I. C. C. 421.
   2. *Percentage Adjustment.*
      (a) Chamber of Commerce of Freeport *v.* C. M. & St. P. Ry. Co., 33 I. C. C. 673.
      (b) Michigan Percentage Cases, 47 I. C. C. 409.
      (c) South Bend Chamber of Commerce *v.* Director General, 57 I. C. C. 215.
   3. *Mississippi River Crossings.*
      (a) Mississippi River Cases, 28 I. C. C. 471; 29 I. C. C. 536.
      (b) Class Rates to and from Quincy, 32 I. C. C. 471.
      (c) North Iowa Traffic Asso. *v.* Director General, 58 I. C. C. 491.
   4. *Wisconsin-Twin Cities-Duluth.*
      (a) In re C. St. P. & K. C. Ry. Co., 2 I. C. C. 231, 2 I. C. R. 137.
      (b) Wisconsin Rate Cases, 44 I. C. C. 602.
      (c) La Crosse Chamber of Commerce *v.* A. A. R. R. Co., 61 I. C. C. 289.

(d) Twin Cities Cases, 33 I. C. C. 577.
(e) Second Duluth Case, 46 I. C. C. 585.

5. *C. F. A. Adjustment.*
   (a) Five Per Cent Case, 31 I. C. C. 350, 399-403.
   (b) C. F. A. Class Scale Case, 45 I. C. C. 254.
6. *Missouri River-Interior Iowa-Nebraska.*
   (a) Burnham-Hanna-Munger Co. *v.* C. R. I. & P. Ry. Co., 14 I. C. C. 299.
   (b) Warnock *v.* C. & N. W. Ry. Co., 21 I. C. C. 546.
   (c) Interior Iowa Cases, 46 I. C. C. 39.
   (d) Missouri River-Nebraska Cases, 40 I. C. C. 201.
7. *Colorado-Utah-Montana Common Points.*
   (a) Kindel *v.* N. Y. N. H. & H. R. R. Co., 15 I. C. C. 555.
   (b) Colorado Mfrs. Asso. *v.* A. T. & S. F. Ry. Co., 28 I. C. C. 82.
   (c) Montrose & Delta Counties *v.* D. & R. G. R. R. Co., 34 I. C. C. 409.
   (d) Com'l Club, Salt Lake City *v.* A. T. & S. F. Ry. Co., 19 I. C. C. 218.
   (e) Class and Commodity Rates to Salt Lake, 32 I. C. C. 551.
   (f) Minnesota Rate Cases, 230 U. S. 352.
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Johnson and Van Metre, pp. 147-239.

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Charles F. Adams, *Railroad Accidents* (Putnam, 1879).

Dixon, pp. 76-81.

Henry S. Haines, *Efficient Railway Operation* (Macmillan, 1919), pp. 95-140.

Francis E. Leup, *George Westinghouse.*

James Morgan, *Life of Edward A. Mosely.*

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Haines, pp. 354-401.

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Haines, pp. 274-298.

C. O. Ruggles, "Railway Service and Regulation," *Quarterly Journal of Economics,* vol. 33.

Chapter XIX. Special Facilities and Privileges.

H. B. Fuller, *Interstate Commerce,* pp. 103-126; 288-300; 392-396.

Chapter XX. New Construction and Abandonments.

Glenn D. Bradley, *Story of the Santa Fe* (Badger, 1920).

Stuart Daggett, *History of the Southern Pacific* (Ronald, 1922).

Dewing, vol. 2, pp. 88-104.

Howard D. Dozier, *History of the Atlantic Coast Line Railroad* (Houghton Mifflin, 1920).

Ripley, *Problems:* H. G. Pearson, *Early American Conditions,* pp. 62-91.

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Ripley, *Finance*, pp. 313-370.

Problems: The Minnesota Rate Cases, pp. 642-715.

Homer B. Vanderblue, *Railroad Valuation by the Interstate Commerce Commission* (Harvard, 1920).

Chapter XXIV. The Protection of Investors.

Dewing, vol. 5, pp. 3-95.

Dixon, pp. 284-299.

Walter E. Lagerquist, *Investment Analysis*, pp. 245-327 (Macmillan, 1921).

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Dixon, pp. 89-106; 177-190; 310-334.

C. O. Fisher, "Use of Federal Power in Settlement of Railway Labor Disputes," Bulletin No. 303, U. S. Bureau of Labor Statistics.

Sharfman, pp. 174-186; 310-346; 427-431.

Chapter XXVI. The Integrity of the Accounts.

Henry C. Adams, *American Railway Accounting* (Holt, 1918).

Dewing, vol. 3, pp. 3-28; 54-71.

Dixon, pp. 61-66.

Johnson and Van Metre, pp. 254-273.

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Dewing, vol. 4, pp. 69-108.

Dixon, pp. 268-283.

Hadley, pp. 74-99.

Johnson and Van Metre, pp. 308-323.

Ripley, *Finance*, pp. 413-533; 549-574.

Problems: B. H. Meyer, *Northern Securities Company*, pp. 553-566; Stuart Daggett, *The Union Pacific-Southern Pacific Merger Dissolution*, pp. 567-596.

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